



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 100 OF 2021**

**TRANSEAST LIMITED.....PLAINTIFF**

**-VERSUS-**

**TRIDENT INSURANCE COMPANY LIMITED.....DEFENDANT**

**AND**

**MICHAEL MUTUNGA & JOHN KATUTA MUSTISYA**

**(suing for and on behalf of the estate of**

**ROSEMARY NZIZA MUTISYA - DECEASED).....INTERESTED PARTY**

**RULING**

[1] The Notice of Motion dated **23 September 2021** was filed herein on **27 September 2021** by the plaintiff, **Transeast Limited**. It was filed pursuant to **Article 159(2)(d)** of the **Constitution of Kenya, 2010**; **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 51 Rules 1, 3 and 4** of the **Civil Procedure Rules, 2010**. It seeks orders, (some of which are now spent), that:

[a] The application be certified urgent to be heard forthwith and *ex parte* in the first instance and be fixed for *inter partes* hearing thereafter; (spent).

[b] Pending the hearing and determination of the application *inter partes* or further orders, the Court be pleased to stay the enforcement of the Judgment and Decree against the plaintiff/applicant in **Nakuru CMCC No. 336 of 2012**; (spent)

[c] Pending the hearing and determination of the application *inter partes* or further orders, the Court be pleased to stay enforcement of all Judgments and Decrees against the plaintiff/applicant arising from the accident which occurred on **14 November 2006** involving Motor Vehicle Registration No. KAN 575/ZB8566 and GK A 744L; (spent).

[d] Pending the hearing and determination of this suit or further orders, the Court be pleased to stay the enforcement of the Judgment and Decree against the plaintiff/applicant in **Nakuru CMCC No. 336 of 2012**;

[e] Pending the hearing and determination of this suit or further orders, the Court be pleased to stay the enforcement of all Judgments and Decrees against the plaintiff/applicant arising from the accident which occurred on **14 November 2006** involving Motor Vehicle Registration No. KAN 575L/ZB8566 and GK A 744L;

[f] The costs of the application be borne by the defendant/respondent.

[2] The application is hinged on the grounds that the plaintiff stands to suffer irreparably unless the orders sought hereinabove are granted as the plaintiff is financially constrained and unable to satisfy the Judgments and Decrees emanating from the accident which occurred on **14 November 2006** involving motor vehicle Registration No. KAN 575L/ZB8566 and GK A 744L; including Judgment and Decree in **Nakuru CMCC No. 336 of 2012**. It was further the contention of the plaintiff that it has an insurance contract with the defendant vide **Policy No: 04/XP/9900681** in which the defendant is under obligation to indemnify it, not only by virtue of a valid contract between the parties, but also under **Section 10** of the **Insurance (Motor Vehicles Third Party Risks) Act**.

[3] In the Supporting Affidavit, sworn by one of the plaintiff's directors, **Ketan Moolraj**, it was deposed that, following the accident, the interested party filed **Nakuru CMCC No. 336 of 2012** and obtained Judgment in its favour; that although the defendant was fully aware of the conclusion and outcome of **Nakuru CMCC No. 336 of 2012**, it did not communicate the conclusion or outcome to the plaintiff; and that the plaintiff only became aware of execution proceedings in the matter after auctioneers visited its premises to attach its property. It was further the averment of **Mr. Moolraj** that, after the plaintiff's property had been attached, it communicated the fact both orally and in writing to the defendant and requested it to indemnify the plaintiff against the interested party's claim but that the defendant has failed to do so. Hence it was constrained to make partial payment to ward off sale of its property in expectation of a refund from the defendant but no such payment has been forthcoming from the defendant. Thus, the plaintiff is apprehensive that it stands to suffer irreparably unless the orders sought are granted.

[4] The plaintiff also expressed concern that several other suits have been filed against it in respect of the same accident, in which the defendant had engaged counsel to defend the claims on behalf of the plaintiff; and in which Judgments may have likewise been entered without the plaintiff's knowledge. Thus, the plaintiff asserted that stay of all the Judgments and Decrees against it arising from the subject accident would not only forestall irreparable harm to it, but would also ensure that the defendant does not avoid liability to third parties such as the interested party, who are protected under **Section 5(b)** of the **Insurance (Motor Vehicles Third Party Risks) Act**.

[5] The defendant is yet to file its pleadings in this matter and, although duly served with the instant application, it has not filed a response thereto. On **12 October 2021** when the matter came up for *inter partes* hearing of the application, the defendant was represented by **Ms. Wamae**, at whose instance the defendant was granted time to file a response to the application. No response was filed thereafter and there was no representation, either for the defendant or the interested party on **19 October 2021**; a date fixed in the presence of counsel for the interested party. Accordingly, **Mr. Okere** prayed that the matter be proceeded with *ex parte* and that the application to be allowed as prayed. He relied on the List and Bundle of Authorities filed herein on **8 October 2021**.

[6] I have given careful consideration to the application along with its Supporting Affidavit and the annexures thereto. It is manifest therefrom that the plaintiff is one of the defendants in **Nakuru CMCC No. 336 of 2012**; and that the said suit was filed by the interested party herein. The plaintiff has further demonstrated that the said suit was heard to conclusion and judgment entered in favour of the interested party, in respect of which Warrants of Attachment and Sale were issued on **13 August 2021** for the sum of **Kshs. 2,283,619.80** for execution by **Compliance Auctioneers**. The relevant documents, including the Judgment of the lower court were annexed to the Supporting Affidavit in proof of the plaintiff's averments. The said documents include a Proclamation Notice served on the plaintiff on **19 August 2021** as well as copies of email communication sent by the plaintiff to the defendant, seeking settlement of the decretal sum in **Nakuru CMCC No. 336 of 2012**.

[7] The plaintiff has averred that it was unaware of the Judgment for the reason that the defendant had engaged counsel to defend the suit on its behalf; and that at no time did the defendant alert it that Judgment had been passed in the matter. At paragraph 11 of the Supporting Affidavit, the plaintiff averred that:

**"...the Plaintiff/Applicant has noted with a lot of concern that the Defendant/Respondent has developed a modus operandi wherein the Defendant/Respondent defends third party claims on behalf of the Plaintiff/Applicant without informing the Plaintiff/Applicant of the outcome of such claims and without settling those third-party claims. This has invariably led to the Plaintiff/Applicant's assets being attached to force payment by the Plaintiff/Applicant notwithstanding the indemnity obligations of the Defendant/Respondent under the Policy. This is what transpired in NAKURU CMCC NO. 336 OF 2012."**

[8] Accordingly, the plaintiff has filed this suit seeking declaratory orders, among other reliefs, to compel the defendant to settle the interested party's claim pursuant to the Judgment and Decree passed in **Nakuru CMCC No. 336 of 2012**. The purpose of the instant interlocutory application is therefore to preserve the current status of the parties pending the hearing and determination of the suit.

[9] Although 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 for the application, it has been pointed out time and again that these provisions do not, in themselves give the requisite procedural guidelines for such an application. For instance, in **Michael Mungai vs. Housing Finance Co. (K) Ltd & 5 Others** [2017] eKLR, the Supreme Court held that:

**"Justice has to be sought within the justice system, which has rules and regulations that govern how one pursues his cause of action. It is not enough for a person to plead pursuit of justice and approach a court of law. Before one approaches a court in pursuit of justice, he or she must be cognizant that he has a justiciable cause of action. Even with such a cause of action, one has to follow the legal regime that informs him as to which court to approach, and in which manner: hence the rules of procedure in our statute books...Before a Court of law can invoke Article 159 of the Constitution and focus on substantive justice, the Court must at the first instance be properly moved and there must be before it a legitimate and cognizable cause of action. In the case of Raila Odinga v I.E.B.C. & Others [2013] eKLR this Court said that Article 159(2)(d) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court..."**

[10] As this is not an appeal, one of the more relevant procedural provisions is **Order 40 Rule 1** of the **Civil Procedure Rules**, which 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)**

[11] 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.” Thus, 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/proceedings as sought by the plaintiff.

[12] 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."**

[13] 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."**

[14] At this point, the Court need not examine the merits of the plaintiff's case too closely; but it must, nevertheless, be satisfied that there is a right as claimed by the plaintiff 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."**

[15] The plaintiff has demonstrated that it took out a policy with the defendant in respect of the subject motor vehicle, pursuant to which the defendant was obliged to indemnify it against third party risks. A copy of the subject policy was exhibited as **Annexure KM2** to the Supporting Affidavit. Accordingly, the plaintiff has demonstrated a *prima facie* case worth calling upon the defendant to respond to. It is instructive that **Section 10(1)** of the **Insurance (Motor Vehicles Third Party Risks) Act** stipulates that:

**"If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."**

[16] There being no response to the instant application, I am satisfied that the plaintiff has a genuine cause for complaint, for that provision gives it a definite cause of action against the defendant. 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.”

[17] In addition to the foregoing, the plaintiff has demonstrated that an attachment has been proclaimed over its property and that the same is on the verge of being sold in execution of the lower court's decree. I am therefore satisfied that the plaintiff has shown that it **stands to suffer irreparably should the 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."**

[18] Thus upon balancing the interests of the plaintiff, the defendant and the interested party, I am convinced that no inconvenience or prejudice will be visited on either the defendant or the interested party for which costs and interest would not be adequate recompense. On the other hand, the plaintiff risks suffering immense prejudice should the attached property be sold in execution in respect of a peril for which it took out an insurance cover with the defendant. It is also manifest that the application was brought without undue delay, granted that it was filed on **27 September 2021**, within a month of the attachment. It is worth noting that the plaintiff made efforts to pay off the sums due, even as it pleaded with the defendant to honour its part of the bargain.

[19] As for the other claims arising from the subject accident, I note that no particulars were supplied by the plaintiff. Thus, the number of claims is unknown; it is not explicit at what stages those other cases have reached if at all, and whether indeed there are decrees in favour of the claimants against the plaintiff. An enduring principle is that Court orders cannot issue in a vacuum or in vain. Good cause must first be established to attract appropriate relief from the Court. Since there is a substantive prayer for a declaration in respect of those other claims, this is a matter that ought to await the hearing and final determination of the suit. Thus, prayer (e) is declined for now.

**[20]** In the light of the foregoing, I am satisfied that the plaintiff's application dated **23 September 2021** is meritorious. The same is hereby allowed and orders granted as hereunder:

**[a]** That stay of enforcement of the Judgment and Decree issued against the plaintiff/applicant in **Nakuru CMCC No. 336 of 2012** be and is hereby granted pending the hearing and determination of this suit or further orders of the Court;

**[b]** The costs of the application be costs in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10<sup>TH</sup> DAY OF NOVEMBER 2021.**

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**OLGA SEWE**

**JUDGE**