



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 48 OF 2019

DORA MBULA T/A TAMARILLO JUNIOR ACADEMY.....PLAINTIFF/APPLICANT

-VERSUS-

AFRICA MERCHANT ASSURANCE COMPANY LIMITED.....DEFENDANT/RESPONDENT

AND

HILLARY NYABALI NDUSU.....INTERESTED PARTY

RULING

[1] Before the Court for determination is the Notice of Motion dated **11 December 2019**. It was filed herein by **M/s Aloo Romanus & Company Advocates** on behalf of the plaintiff pursuant to **Articles 40, 48, 50(1) and 159** of the **Constitution of Kenya**, **Sections 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 51 Rule 18** of the **Civil Procedure Rules, 2010**. The plaintiff thereby seeks the following orders:

[a] Spent

[b] Spent

[c] That the Court be pleased to stay execution of judgment and decree and any further proceedings in **Eldoret CMCC No. 888 of 2018: Hillary Nyabali Ndusu vs. Dora Mbula T/A Tamarillo Junior Academy** pending the hearing and determination of the suit.

[d] That the costs of the application be provided for.

[2] The application is predicated on the grounds that the plaintiff is the registered and insured owner of Motor Vehicle Registration No. KAP 496Q; and that she had taken out a third party insurance policy from the respondent for the subject motor vehicle for the period commencing on **2 May 2018** to **3 January 2019**. It was further the assertion of the plaintiff that the said motor vehicle was involved in a road traffic accident on or about **24 May 2018** in which a third party, who is the interested party herein, sustained bodily injuries. Consequently, the interested party sued her before the Eldoret Chief Magistrate's Court in **CMCC Case No. 888 of 2018** and obtained a decree in his favour in the sum of **Kshs. 528,900/=** together with interest and costs, which the defendant has declined to satisfy. It was thus the contention of the plaintiff that it became necessary to file this declaratory suit to compel the defendant to meet its obligation.

[3] The plaintiff is apprehensive that, unless an order of stay of execution is granted as prayed, her declaratory suit shall be rendered nugatory. She therefore prays that, pending the hearing and determination of this suit, the Court be pleased to grant her an order of execution of the lower court's decree.

[4] The court record shows that the application, along with the **Plaint and Summons to Enter Appearance** were duly served on the defendant. Thus far, there appears to be no response to the application by the defendant. The interested party on his part filed a **Replying Affidavit** on **13 January 2020** confirming that he was involved in a road traffic accident on **24 May 2018**, and that he filed a suit against the plaintiff for compensation, being **Eldoret CMCC No. 888 of 2018**, in which judgment was entered in his favour as deposed to by the plaintiff. He further averred that upon entry of judgment he commenced execution proceedings against the plaintiff whereupon the advocates for the parties agreed on a mode of payment and a consent recorded in the suit to that effect, by which the plaintiff was to settle the decretal sum by instalments of **Kshs. 100,000/=**. It was thus the contention of the interested party that by filing the instant application, the plaintiff was simply out to circumvent the consent order; and therefore that his application ought not to be countenanced by the Court.

[5] The application was canvassed by way of written submissions; and in the written submissions filed herein on **4 February 2020** by **Mr. Aloo** for the plaintiff, the following three issues were proposed for determination:

- [a] Whether there existed a contract between the parties;
- [b] Whether the defendant breached the contract;
- [c] Whether it is appropriate to grant stay of execution; and,

[6] Counsel for the plaintiff then proceeded to submit on the three issues, drawing attention to the initial contract of insurance between the plaintiff and the defendant. He relied on **Anctol vs. Manufacture Life Insurance Co.** [1989] AC 604 for the proposition that every insurance contract must be founded on an identifiable insurable interest; and that in this case the plaintiff was shown to be the registered owner of the suit motor vehicle, **Registration No. KAP 496Q**, which was insured by the defendant vide Policy No. AM3/080/1/008795/2011 against third party risks, and for which the plaintiff had been paying premiums when the accident happened.

[7] It was further the submission of **Mr. Aloo** that, on the basis of the findings made in **CMCC No 888 of 2018**, it is only fair and just that the defendant performs its obligations by satisfying the decree passed therein. Counsel also made reference to **Section 10** of the **Insurance (Motor Vehicles Third Party Risks) Act, Chapter 405** of the **Laws of Kenya** and the cases of **Charles Mackenzie Wambua vs. Africa Merchant Assurance Co. Ltd & Another** [2014] eKLR and **New Great Insurance Co. of India Ltd vs. Lilian Everlyne Cross & Another** [1966] EA 90, to buttress his submission that the purpose of an insurance contract is to ensure that a third party who is injured by the insured's motor vehicle is compensated for his loss, pain and suffering. He urged that, unless stay of execution is granted, the plaintiff would be exposed to a liability which the defendant is under obligation in law to bear.

[8] **Mr. Keter**, counsel for the interested party, filed his written submissions on **3 March 2020**. He took the view that while the plaintiff has the right to bring and pursue this declaratory suit, she is not entitled to an order of stay of execution for the reason that the parties negotiated and filed a consent order on the mode of payment of the decretal sum. Accordingly, he proposed only one issue for determination, and that is whether there exists a consent order between the parties which was recorded in the primary suit and whether it is still in force. His submission was that, having freely entered into a consent with the interested party, which was adopted by the court in **CMCC No. 888 of 2018**, there would be no question of stay of execution so long as that consent order remained in force. Accordingly, counsel urged for the dismissal of the application.

[9] I have given consideration to the application within the backdrop of the averments in the **Plaint** and the two affidavits filed by the parties. It is common ground that the interested party is the decree-holder in **Eldoret CMCC No. 888 of 2018**, a case in which he had sued the plaintiff herein for compensation for injuries sustained in a road traffic accident involving the plaintiff's Motor Vehicle Registration No. KAP 496Q. It is likewise an agreed fact that the interested party was awarded **Kshs. 528,900/=** together with interest and costs by the trial court. Indeed, the plaintiff annexed to her Supporting Affidavit a copy of the Judgment delivered in **Eldoret CMCC No. 888 of 2018** as Annexure DM 5 in proof thereof. She also exhibited copies of the Application for Execution of Decree, Warrants of Attachment of Movable Property and a Proclamation of Attachment issued in the matter. It is against that background that the plaintiff now seeks stay of execution.

[10] As the defendant is yet to file its pleadings herein, it is not manifest as of now whether or not there was a valid contract of insurance between the plaintiff and the defendant in respect of Motor Vehicle Registration No. KAP 496Q, unlike the situation that played out in **Charles Mackenzie Wambua vs. Africa Merchant Assurance Co. Ltd & Another** (supra). Accordingly, the question as to whether or not the defendant has breached the terms of the insurance contract belongs to the main suit and is clearly not an issue in this application. Thus, I agree entirely with the submission of **Mr. Keter** that the only issue for determination herein is whether the plaintiff is entitled to stay of execution on the basis of the facts presented herein.

[11] It is instructive that the instant application has not been brought under **Order 42 Rule 6** of the **Civil Procedure Rules**, for this is not an appeal from the decision of the subordinate court. Counsel cited **Articles 40, 48 50(1) and 159** of the Constitution of Kenya along with **Sections 1A, 1B** of the **Civil Procedure Act**; which are general provisions that bear no specific guidance on the facts in issue herein. Counsel also cited **Order 22 Rule 22** of the **Civil Procedure Rules**, but that provision is irrelevant. It caters for stay of execution in situations where a decree has been sent to another court for purposes of execution; which is not so herein. For instance, it provides in **Sub-rule (1)** that:

“The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”

[12] Needless to say that no decree has been sent to this Court for purposes of execution and, as has been pointed out hereinabove, this is not an appeal from the judgment and decree of the Senior Resident Magistrate in **Eldoret CMCC No. 888 of 2018**. Moreover, other than the fact that there is a decree in existence, there is no proof herein that execution thereof is imminent. To the contrary, it was the contention of the interested party that the parties had amicably agreed for the payment of the decree by instalments of **Kshs. 100,000/=** when the plaintiff inexplicably applied for stay. Indeed, **Annexures HNN1 and HNN2** to the interested party's Replying Affidavit confirm that on the **7 November 2019**, the plaintiff's advocate forwarded to the advocate for the interested party **Cheque No. 021692** in the sum of **Kshs. 100,000/=** in part payment of the decretal sum. In the circumstances, **Order 22 Rule 22** cannot avail the plaintiff.

[13] I note however that the plaintiff also relied on **Section 63(e)** of the **Civil Procedure Act** which gives the Court the powers to make **“... such other interlocutory orders as may appear to the court to be just and convenient.”** Hence, the question to pose is whether it would be just and convenient to issue an order of stay in the circumstances.

[14] At paragraph 8 of the interested party's Replying Affidavit, he averred that on **14 November 2019** a consent was recorded as between his advocates and the advocates for the plaintiff by which the plaintiff was allowed to settle the outstanding sum by way of instalments of **Kshs. 100,000/=**; and that the first instalment was due by **21 November 2019** and a further sum of **Kshs. 100,000/=** on or before **30 January 2020**. He however sought to rely, not on the consent order itself or a copy of the proceedings wherein such consent order is evinced, but on a letter written by the advocate for the plaintiff, by which he forwarded a Banker's Cheque No. 021692 in the sum of **Kshs. 100,000/=** to the advocate for the interested party. That letter is dated **7 November 2019**; and given the backdrop of the previous attempt at execution, including the Proclamation dated **22 October 2019**, it is insufficient, of itself, to support an inference that there was indeed a consent order duly negotiated and adopted as an order of the lower court for the satisfaction of the entire decree. To the contrary, by immediately filing this declaratory suit, the plaintiff made it clear that she was, and still is, intent on looking to the defendant herein to satisfy the claim.

[15] Having found, on the material availed before me herein, that that the interested party has not proved the existence of a consent order for the payment by the plaintiff of the entire decretal sum along with interest and costs, I am unable to find that the filing of the instant application is an attempt to claw back on such an agreement. To the contrary, it is my finding that the plaintiff has a *prima facie* case against the defendant which she ought to be given a chance to pursue before being compelled to satisfy the decree; and therefore that it is just and convenient to grant the orders sought. I am confident that no prejudice will befall the interested party, granted that the decretal sum continues to earn interest in his favour.

[16] In the result, I find merit in the application dated **11 December 2019**. The same is hereby allowed and orders granted as hereunder:

[a] That an order of stay of execution of judgment and decree and any further proceedings in **Eldoret CMCC No. 888 of 2018: Hillary Nyabali Ndusu vs. Dora Mbula T/A Tamarillo Junior Academy** be and is hereby issued pending the hearing and determination of the suit.

[b] That the costs of the application be borne by the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 7TH DAY OF OCTOBER 2020

OLGA SEWE

JUDGE