



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CIVIL APPEAL NO. 8 OF 2016**

**OKUMU CONSTANCE.....1<sup>ST</sup> APPELLANT**

**SAMMY MUTUNGA MAINGI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ANNAH MORAA.....RESPONDENT**

***(Being an appeal from the judgement and decree of Hon. A. Sitati, SRM, delivered on 6<sup>th</sup> November 2015***

***in Narok CMCC No. 70 of 2012, and being an appeal from the order of Hon. E.K. Usui, SRM,***

***delivered on 6<sup>th</sup> March 2019 in Nairobi Milimani CMCC NO. 4201 OF 2018)***

**RULING**

**The case for the applicants.**

1. Pursuant to the provisions of Order 50 Rule 1, Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules and section 3A of the Civil Procedure Act, section 10 (2) ((b) Insurance (Motor Vehicle Third Party Risk) and all other enabling provisions of the law, the applicants through their notice of motion dated 6/3/2019 are seeking the following orders from this court.

1) *spent*

2) an order to stay any further proceedings and execution respecting Nairobi CMCC NO. 4201 OF 2018 Annah Moraa v Jubilee Insurance Co. Ltd pending the hearing and determination of the application.

3) an order of stay of execution respecting the judgement in Nairobi CM CC No 4201 OF 2018, Annah Moraa v Jubilee Insurance Co. Ltd.

4) an order of stay of execution of the judgement delivered in Narok CMCC No. 70 of 2015.

5) an order to make provision for costs.

2. The application is based on the major following grounds. The appellants filed an appeal against the judgement delivered in Narok CMCC No. 70 of 2012. The trial court ordered stay of execution upon application on condition that the decretal amount be deposited in a joint account in the names of the advocates for the parties. The respondent frustrated the efforts of the appellants to comply with the conditions of the order of stay of execution in opening a joint account by hoarding the account opening documents.

3. As a result of the said frustration the applicant made a successful application that reviewed the terms of opening a joint account, but the ruling was delivered without notice to the applicants. Furthermore, the respondent in furtherance of the said frustration disabled the applicants from complying with the order to furnish security pending the appeal. And in furtherance thereof, the respondent then filed a declaratory suit namely Nairobi CMCC No. 4201 of 2018, Annah Moraa v Jubilee Insurance Co. Ltd in which she sought enforcement of the decree of the trial court during the pendency of the foregoing appeal.

4. The respondent proceeded to successfully request for an interlocutory judgement against the appellants' insurer in Nairobi CMCC No.

4201 of 2018, Annah Moraa v Jubilee Insurance Co. Ltd.

5. As a result of the entry of the interlocutory judgement, the applicants successfully applied for it to be set aside; but were condemned to pay the thrown away costs in the sum of Shs 7,000/- but they were allowed to file a defence within 7 days.
6. The applicants learned of the delivery of the immediate foregoing ruling after the time prescribed by the court had lapsed. As a result, the applicants filed an application to extend time within which to comply with the terms of the ruling, but the trial court declined to satisfy it as urgent. The trial court ordered the parties to fix the hearing date in the registry.
7. Thereafter the file disappeared from the registry only to be traced in the decree section of the registry. When the application for extension of time was heard on 6/3/2019, the court summarily dismissed it terming it an abuse of the court process.
8. There are now parallel proceedings being the pending appeal in Narok and the declaratory enforcement proceedings in the magisterial court in Nairobi.
9. The declaratory suit ought to have been filed in Narok where the parent suit was filed. It is in the interests of justice that the proceedings in Nairobi CCMCC No. 4201 of 2018 be stayed. Additionally, the proceedings ought to be stayed in order to preserve the integrity of the court pending the hearing and determination of the instant appeal.
10. The applicants are willing to deposit the decretal amount in court in view of the previous frustrations by the respondent within a reasonable time. The instant appeal is meritorious and will be rendered nugatory in the event the already initiated execution process proceeds. And that the respondent has no known capacity to refund the decretal sum of shs 1, 552, 525.30 which is inclusive of costs if the appeal succeeds.
11. Finally, the applicants have stated that the respondent has filed garnishee proceedings that are scheduled for hearing on 8/3/2019.
12. The applicants through the legal officer of Jubilee Insurance Co. Ltd (Ruth Mbalelo) has deposed to a 29 paragraphs supporting affidavit to which are annexed relevant documents in support of the application. She has deposed to the same matters that appear as grounds on the face of the notice of motion, which I find unnecessary to recite herein.

#### **The case for the respondent**

13. The respondent has filed 17 grounds of opposition and a 28 paragraphs replying affidavit in opposition to the application.
14. The following are the major grounds of opposition. The application is incompetent, misconceived and is otherwise an abuse of the court process. The application is *res judicata* in terms of sections 6 and 7 of the Civil Procedure Act (Cap 21) Laws of Kenya. The applicants have not come to court with clean hands and have variously refused, neglected and/or failed to comply with court orders. The applicants' insurance company has misled the court as it enjoys interim orders from the Nairobi High Court vide Nairobi HCCA No 129 of 2019, Jubilee Insurance Co. Ltd v Annah Moraa issued on 7/3/2019.
15. The application has been overtaken by events. The applicants' insurance company has refused to honour its statutory obligations leading to the filing of the declaratory suit. The applicants have moved two superior courts namely at Narok and Nairobi for interim orders of stay of execution in Nairobi CCMCC No. 4201 of 2018 (Annah Moraa v Jubilee Insurance Co. Ltd; without disclosing this fact to either court, which the respondent says is an abuse of the court process.
16. The applicants had been served with notice of service in respect of the courts' rulings dated 19/1/2018 and 23/2/2018, which notices were sent by post. There is no appeal before this court in respect of the judgement and decree in Nairobi CCMCC No. 4201 of 2018 (Annah Moraa v Jubilee Insurance Co. Ltd.
17. Furthermore, the applicants are guilty of indolence and they have not satisfied the requirements of Order 42 Rule 6 (2) of the 2010 Civil Procedure Rules. The affidavit of Ruth Mbalelo is oppressive, misleading on material facts and it also offends the provisions of Order 19 of the Civil Procedure Rules.
18. The applicants have asserted that the application is brought in bad faith, and is guilty of filing a multiplicity of applications and appeals and which is only meant to deny the respondent the enjoyment of the fruits of her judgement.
19. The applicants are also seeking security for their costs.
20. The respondent in her replying affidavit has reproduced the same matters that are set out in her grounds of opposition except for the following major matters.
21. On 26<sup>th</sup> January 2016, a consent for stay of execution was entered in the trial court on condition that the decretal sum be deposited in an interest earning account as security, which order has been annexed and marked as Exhibitx "AM1". On 29/2/2018 the trial court extended time for 14 days in favour of the applicants to comply with the order of the court dated 17/3/2017, to which the respondent has annexed the said order as annex marked "Exhibit AM2". Following advice of her counsel, which she believes the applicants were served with ruling notices both before and after delivery of the said rulings, to which she annexed the said notices as exhibits marked as "exhibits AM3 and 4".
22. The respondent has also annexed to her affidavit the copies of the court dispatch register for the foregoing notices of ruling marked as

exhibits (AM5 and 6), which she says shows the applicants were aware of the dates when the rulings were to be delivered.

23. The filing of the declaratory suit was done in accordance with sections 14 and 15 of the Civil Procedure Act, after Jubilee Insurance Co Ltd failed to comply with the court orders in Nairobi CCMCC No. 4201 of 2018 (Annah Moraa v Jubilee Insurance Co. Ltd).

24. Finally, the respondent has deposed that paragraphs 4, 6, 7, 8, 9, 10, 13, 15 and 19 of Ruth Mbalelo be struck out and/or be subjected to cross examination on her averments and that she be punished for lying to the court.

25. The applicants' insurance company did not comply with the orders of the court and its application for extension of time was summarily dismissed on the grounds that that the said company was being economical with the truth and was misleading and telling falsehoods to the court on material facts.

26. I have considered the affidavit evidence of the parties, their submissions and the authorities cited in the light of the applicable law. As a result, I find the following are the issues for determination.

- 1) Whether the applicants have complied with the provisions of Order 42 Rule 6 of the Civil Procedure Rules.
- 2) Whether the order sought in relation to Nairobi HCCA No 129 of 2019, Jubilee Insurance Co. Ltd v Annah Moraa, which order was issued on 7/3/2019, is *res judicata*.
- 3) Whether the respondent was entitled to file for an order of a declaration in Nairobi.
- 4) Who bears the costs of this application?
- 5) What are the final orders in this application?

#### **Issue 1**

27. Section 79G of the Civil Procedure Act permits the applicants to appeal within 30 days after delivery of the judgement appealed against. I find that unless an order of stay of execution is granted, the applicants right to have their appeal heard as provided for by the foregoing provisions of the law, will be rendered nugatory.

28. Furthermore, I also find that the applicants will suffer substantial loss unless an order of stay of execution is granted. This order will preserve the subject matter of the appeal pending the hearing and determination of the appeal.

29. In addition to the foregoing, I also find that the applicants have prosecuted their application without unreasonable delay.

30. I finally, find that the applicants are willing to deposit security for the due performance of the obligations that the court might ultimately find binding upon them.

31. I therefore find that the applicants have satisfied the requirements of Order 42 Rule 6 of the Civil Procedure Rules.

#### **Issue 2**

32. I find that the applicants had an order of stay of execution in Nairobi HCCA No 129 of 2019, Jubilee Insurance Co. Ltd v Annah Moraa, which was issued on 7/3/2019. I therefore find that the matter is *res judicata* and I therefore have no jurisdiction to make any order in relation to that appeal in Nairobi. The applicants' prayer for an order of stay of execution in this court in relation to the same matter is a gross abuse of the court process. It is equally a gross abuse of the court process bordering on criminality for the applicants attempt to misled the court that they had not been served with notices of delivery of the rulings in court in view of the abundant evidence from the dispatch register that notices of the said rulings marked as exhibits (AM5 and 6), which show that the applicants were aware of the dates when the rulings were to be delivered.

#### **Issue 3**

33. The respondent had a right to file for an order of a declaration to enforce the judgement she had recovered. If the applicants took the view that the enforcement suit ought to have been filed in Narok, they should have sought its transfer to Narok magisterial court from Nairobi.

#### **Issue 4**

34. The applicants have succeeded in their application. Their conduct is not in any way excusable. They have unnecessarily made this litigation lengthy and costly. In the circumstances, the respondent will have the costs of this application.

#### **Issue 5.**

35. The applicants' application succeeds with the result an order of stay of execution is hereby issued in their favour on condition that they deposit the decretal sum of money (Shs. 1, 552, 525.30 which is inclusive of costs) in a joint interesting earning account in the names of both counsel in a reputable bank or financial institution within 30 days failing which this order will lapse.

**Judgment signed, dated and delivered at Narok this 14<sup>th</sup> day of October, 2020 in the presence of Mr. Lukorito holding brief for Mr. Karanja for the applicants and in the absence of the Respondent.**

**J. M. BWONWONG'A.**

**J U D G E**

**14/10/2020**