



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO 13 OF 2019

NANCY KEMUNTO MOGENI.....PLAINTIFF/APPLICANT

VERSUS

INVESCO ASSURANCE COMPANY LIMITED...DEFENDANT/RESPONDENT

RULING

1. The application before me is a Notice of Motion dated 19th December 2019 seeking the following orders:

2.The execution process commenced against the applicant in Kisi CMCC No 253 of 2014 be stayed pending the hearing and determination of this application or in the alternative;

3.Pending the hearing and determination of this application, the honourable court be pleased to issue an interim injunction restraining the defendant, its servant or agents or otherwise howsoever manner breaching the policy agreement or statutory duty in respect to the judgment in KISII CMCC No 253 of 2014 between Jane Bochere Mavhini v Nancy Kemunto Mogeni (the applicant herein).

4.Pending the hearing and determination of this application the honourable (sic) be pleased to issue a temporary injunction restraining the defendant from breaching the policy agreement and/or statutory duty in respect to satisfy judgment in Kisi CMCC No 253 of 2014.

5. Any other suitable or further orders to be made as the court may deem just.

2. The applicant filed an affidavit in support of the application on grounds that she is the registered owner of motor vehicle No KBC 716C Toyota Hiace (Matatu) which was involved in a road traffic accident on 30th August 2013 at Nyatieko area along Kisii Kisumu road while carrying passengers who sustained bodily harm. By a policy of insurance No. 055/084/1/000807/201/03TPO commencing on 7th August 2013 to 6th September 2013, the respondent was required to cover any liability or bodily injury caused to any person arising from the use of the motor vehicle. The applicant averred that the respondent was under a statutory obligation by virtue of **section 10 of the Insurance (Motor Vehicle Third Party Risk) Act, Cap 450 Laws of Kenya** to satisfy judgments arising out of such accident. She advanced that several suits were filed against her and two have been fully heard and determined and judgment entered against her.

3. The applicant further averred that the judgment in Kisii CMCC NO 251 of 2014 was partially satisfied by the defendant. However on 1st October 2015 after her motor vehicle had been attached and advertised for sale, the applicant was forced to pay Kshs 250,000/- towards the remaining balance to procure the release of the attached vehicle. She deposed that judgment has also been entered against her in respect of **Kisii CMCC No 253 of 2014** but the respondent has failed to satisfy the judgment thus breaching the policy agreement and its contractual obligations. The applicant deposed that there is a risk that she may be committed to civil jail as she has been served with a notice to show cause and warrants of arrest in execution in respect of **Kisii CMCC No 253 of 2014**.

4. Despite being served with the application the respondent failed to file a response.

5. On 13th February 2020 this court directed that the application be disposed by way of written submissions. Although no written submission were filed, Mr. Bosire counsel for the appellants made submissions that he prays for the orders sought in the application.

6. I have carefully considered the application before me, the evidence that is on record and find that the applicant took up an insurance policy cover number 055/084/1/000807/201/03TPO.

7. **Section 10 (1) of the Insurance (Motor Vehicle Third Party Risk) Act** provides as follows;

“10. Duty of insurer to satisfy judgments against persons insured

(1) 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.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in [section 5\(b\)](#) prescribed in respect thereof in the Schedule.”

8. Section 10(1) of the Insurance (Motor Vehicle Third Party Risk) Act imposes a duty on the respondent to satisfy judgments against persons insured such as the applicant. In this case, the respondent failed to file its response to the application therefore the evidence as per the applicant’s supporting affidavit remains uncontroverted and therefore unchallenged. The respondent’s failure to pay the full decretal sums arising out of Kisii CMCC No 253 of 2014 and Kisii 251 of 2014 where judgment had been entered against the applicant constitutes breach of contract.

9. The applicant in his application seeks injunctive orders. The *locus classicus* case of **Giella v Cassman Brown Co. Ltd 1973 E.A. 358** discussed the conditions to be met before an interlocutory injunction can be granted by stating as follows;

“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 harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”

10. Although the applicant has satisfied the principles on grant of interlocutory injunctions as set out **Giella v Cassman Brown, I find that prayer 4 and 5 which he seeks in his application are spent as they are orders applicable during the pendency of the hearing and determination of this instant application. Further,** the orders sought in the application only relate to the judgment Kisii CMCC No 253 of 2014 and does not seek any orders pertaining to Kisii 251 of 2014.

11. The Notice of Motion dated 19th December 2019 is one for dismissal as it seeks no substantive prayers and the prayers in the application have also been overtaken by events.

Dated and Delivered at KISII this 11th day of November, 2020

A. K. NDUNG’U

JUDGE