



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. 15 OF 2018

IN THE MATTER OF:

ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA

AND

CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS PURSUANT TO ARTICLE 46, 47, AND 40 OF THE CONSTITUTION OF KENYA

AND

SECTION 3A (2) (B) OF THE INSURANCE ACT, CAP 487 LAWS OF KENYA, SECTION 4 & 5 (B) (IV) OF INSURANCE (MOTOR VEHICLES THIRD PARTY RISKS) CAP 405 LAWS OF KENYA AND SECTION 12 (2), 13 (2) AND 94 OF THE CONSUMER PROTECTION ACT NO. 46 OF 2012

AND

THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND PROCEDURE RULES, 2012.

CAROLINE KARIMI MOSES.....PETITIONER

VERSUS

THE INSURANCE REGULATORY AUTHORITY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND REPENDENT

INVESCO ASSURANCE CO. LTD..... 3RD RESPONDENT

MARITA GATIRIA KAMUNDI.....4TH RESPONDENT

RULING

1. The Petitioner applied in a motion dated 30th April 2018 for the following orders;

1. An order of interim injunction restraining the 4th respondent either by themselves, agents and more particularly through Jocet Auctioneers from auctioning/selling motor vehicle registration number KCF 163V or levying any further execution on the petitioner with regard to chukka CMCC No. 189 of 2015 pending interpartes hearing and determination of this application.

2. An order of mandatory injunction ordering the 4th respondent either by themselves/agents and more particularly through Jocet Auctioneers to release motor vehicle registration number KCF 163V to the petitioner pending inter parties hearing.

2. The application is expressed to be brought under rules 21 & 22 of the constitution of Kenya and is supported by the grounds set out in the motion and affidavit sworn by Caroline Karimi Moses. It was averred in brief that she had taken a comprehensive insurance cover for her vehicle KAV 952T with the third respondent for the period between 27th March 2013 and 26th March 2014. On 24th December 2013 the vehicle was involved in a car accident where Robbins Kirimi Kamwara died. Through case filed in Chuka CMCC No. 189 Of 2015 she was

ordered to pay 3,605,482.68 in damages. The case was reported to the 3rd respondents who stated that even if they pay the damages they shall only pay damages up to a maximum of Kshs. 3,000,000 in accordance with section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) cap 405 Laws of Kenya. The 4th respondent in execution of his judgment sent auctioneers to attach her vehicle KCF 163V.

3. In their submissions the petitioner alleged breach of Articles 40, 46 and 47 of the Constitution. More specifically, she argued that her consumer rights and property rights are protected under Article 46 and Article 40 respectively.

4. She stated that the Insurance Regulatory Authority is established under section 3 of the Insurance Act section 3A (2) of the Insurance Act;

- ‘(a) to promote the maintenance of a fair, safe and stable insurance sector;**
- (b) to protect the interest of the insurance policyholders and beneficiaries; and**
- (c) generally to promote the development of the insurance sector.’**

It was the petitioner’s claim that her rights have been violated; a question the High Court under in Article 165 (1) has powers to determine or interpret the Constitution thereto.

5. This application was opposed via a replying affidavit filed in court on 21st May 2018, by Marita Gatiria Kamundi who stated that judgment was passed in her favour in CMCC No. 189 of 2015 which was not appealed. After several demands of payment and failing to receive any payment she instructed her advocate to proceed to execute the decree and did so through Joset Auctioneers. Even after attachment the applicant has not made any efforts to pay. The decretal sum has accumulated interest and costs and now stands at Ksh. 4,000,000. In their submissions they relied on **Giella vs. Cassman Brown [1973] E.A 358** and stated that the applicant has failed to prove a prima facie case with the probability of success. The applicant has not provided any evidence to indicate that the insurance company has failed to pay the applicant the claim and only came to this court with an allegation and even if this were the case the claim is not unconstitutional.

6. The 4th respondent agreed that Article 40 of the constitution provides each individual with the right to acquire property but highlighted that it should be read together with the provisions of Article 24 (1) which provides for limitations of rights and fundamental freedoms. Therefore the attachment of the motor vehicle owned by the applicant is reasonable and justifiable. They relied on **Law Society of Kenya V. Attorney General & 3 Others [2016] eKLR** in Support.

7. The 4th respondent further stated that the applicant has not yet proved that she will suffer any irreparable damage if the injunction orders are not granted. However if the attached motor vehicle is released and sold by the applicant the 4th respondent will have nothing of value to attach. They also provided that they are not a party to the applicant and 3rd respondents contract of insurance and should be made to suffer because of their dispute. They therefore prayed that the application be dismissed with costs.

8. The 2nd respondent in his grounds of opposition filed on 30th May 2018 stated that there was no cause of action pleaded against him as the motion was premised on a misapprehension of the full import of CAP 487 and the Insurance (Motor Vehicles Third Party Risk) Act. The Rights under Article 46 of the Constitution must be read together with Article 24 (1). Therefore the motion lacks merit and is untenable as sections 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act merely apportions liability between the insurer and the insured. Hence the petition has not been pleaded with precision and particularity with regard to the alleged violations.

ANALYSIS AND DETERMINATION

9. I have carefully considered the application, affidavits as well as the applicable law. This application seeks for interim and mandatory injunctions. Of interim injunction, I am content to cite **Ojwang Ag. J** (as he then was) in the case of **Suleiman vs Amboseli Resort Ltd (2004) eKLR 589** when he stated as follows:-

‘.....counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in Giella Vs Cassman Brown, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780-781:- “ A fundamental principle is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong”....’

Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella Vs Cassman Brown the court has had to consider the following questions before granting injunctive relief.

Is there a prima facie case....

Does the applicant stand to suffer irreparable harm...

On which side does the balance of convenience lie? Even as those must remain the basis tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.....’

10. I must admit that this petition is a kind of a squirm for several reasons. It raises matters of rights; consumer rights as well as right to realize fruits of judgment. It is also neither an appeal nor a declaratory suit under cap 405 of the law of Kenya. The application before me is not an application for stay of execution. Nonetheless, the petition raises fundamental issues in relation to the insurance industry. Worth of note is that by law, any person who wishes to use, or cause or permit another person to use, a motor vehicle on a road, must obtain an insurance cover against third party risks. Such is a statutory obligation and disobedience thereof is a criminal offence punishable in law. See section 4(1) which provides as follows:-

Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act.

11. On the other hand, the law imposes a duty on insurer to satisfy judgments against persons insured. See section 10 below:-

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.

12. Notably, third party insurance is one of the brilliant statutory exceptions to the principle of privity of contract. Accordingly, it is the policy of government to ensure that the insurance industry thrives, offers protection to policyholders and beneficiaries. Hence, the law establishes the Insurance Regulatory Authority under section 3 of the Insurance Act and sets out some of its major functions in section 3A (2) thereof to be;

- ‘(a) to promote the maintenance of a fair, safe and stable insurance sector;**
- (b) to protect the interest of the insurance policyholders and beneficiaries; and**
- (c) generally to promote the development of the insurance sector.’**

13. In the mix is the realization that there is a judgment against the insured- the petitioner. I am also aware that only part of the decree has been paid. I am also acutely alive to the fact that the decree holder is entitled to full realization of the decree. And at the centre in these proceedings is the insurer who bears a statutory obligation to satisfy judgment against the insured unless the exceptions provided apply. The insurance has not paid. The government also becomes key player to safeguard the insuring public and is represented by the AG in these proceedings. But, of concern is that any injunction herein would be effective as against the third party whose judgment remains unpaid. Again, any injunction will only be in furtherance of non-payment of the decree; the beneficiary of such anomaly is of course the insurance herein yet they bear statutory obligation to settle judgments against the insured. Such course will portend injustice to the decree holder while providing the insurance company to renege on its statutory obligation. The government will also not be held to its creed and state obligation of protecting the insuring public. This recapitulation of relevant factors points to one thing; that this is a case which should be decided on balance of convenience by adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle and opt for the lower rather than the higher risk of injustice. Accordingly, the court is enjoined under article 23 of the Constitution to fashion appropriate remedy depending on the circumstances for each case. In this case, the appropriate remedy is to order and I hereby order a stay of sale of attached motor vehicle for 45 days only to enable parties fasten a settlement or ponder the best way to deal with this case. It is so ordered. Each party to bear its own cost.

Dated, signed and delivered in open court this 5th day of February, 2019

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F. GIKONYO

JUDGE

In presence of

Mutuma for petitioner

Murango for 4th respondent

A.g - absent

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F. GIKONYO

JUDGE