



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO.2 OF 2019

JOHN NJOGU.....PLAINTIFF/APPLICANT

VERSUS

INVESCO ASSURANCE CO. LTD.....DEFENDANT/RESPONDENT

JOSEPH OUMA NYACHOKO (Suing as personal representative

of the Estate of Michael Otieno Ouma (deceased).....INTERESTED PARTY

RULING

1. What was filed as the substantive matter in this court is a civil suit brought by way of plaint (fast track) dated 12th April 2019 against the defendant, an insurance company for enforcement of payment of the decretal amount in **Kericho Chief Magistrate's Civil Case No.462 of 2014 – Joseph Ouma Nyachoko -vs- John Njogu.**

2. The defendant in the civil suit in the magistrate's court has come to this court through the present suit against his insurer Invesco Assurance Co. Ltd.

3. Together with the plaint the plaintiff filed a Notice of Motion dated same 12th April 2019, seeking among others stay of execution of decree in **Kericho Chief Magistrate's Civil Case No.462 of 2014**, as well as a mandatory injunction for payment by the defendant of Kshs.1,564,686 to the interested party herein who is currently executing against the plaintiff. This is the application that is for decision today.

4. The application has grounds on the face of the Notice of Motion in that though judgment was delivered in the Magistrate's Court in favour of the interested party (who was plaintiff therein) and the defendant herein it was the motor vehicle insurer, the defendant has failed or neglected to honour its legal obligation to pay the decretal amount.

5. The application was also filed with a supporting affidavit giving the details on the case before the magistrate's court in which a decree of Kshs.2,257,695/- was extracted but that the defendant paid only a paltry amount of Kshs.350,000/- resulting in proclamation for sale of the plaintiff's motor vehicle KCG 428Q by public auction for kshs.700,000/-.

6. The defendant does not appear to have filed any response to the application. The interested party however through counsel, Meroka & Company Advocates filed grounds of opposition in the following terms-

1) That the application is fatally defective

2) That the matter against the interested party is misguided and non-suited.

3) That the applicant's application is calculated at denying the interested party the fruits of his judgment.

4) That there is no appeal against Kericho Chief Magistrate's Civil Case No.462 of 2014.

7. At the hearing of the grounds of opposition and application, Mr. Meroka submitted that the suit herein was defective and non-suited as there was no nexus between the plaintiff herein and the interested party. In addition Chapter 403 of the Laws of Kenya did not provide for an automatic settlement of a decree by the insurer, and that there existed elaborate procedures which had to be followed before a declaration can be given on an insurance policy against an insurer.

8. Mr. Mutai for the applicant/plaintiff submitted that there was in existence a contract of insurance between the plaintiff and the defendant

and that the interested party was the plaintiff in the subordinate court and the beneficiary of partial payment.

9. Counsel submitted that as the defendant herein was not a party in the subordinate court, this suit had to be filed in order to seek these prayers. Counsel relied on the case of **British America Insurance Co. Ltd -vs- Julius M. Kanaali – Kajiado HCCC No.1 of 2016; Great Rift Shuttle Services Ltd -vs- African Merchant Assurance Co. Ltd & Another Nairobi HCCC No.213 of 2014 Charles Makenzi Wambua -vs- Africa Merchant Insurance Co. Ltd & Another.**

10. This is for stay of execution and injunctive orders. It was brought under section 1A, 1B, 3A and 63 (c) of the Civil Procedure Act (cap.21) and Article 159 (2) (d) of the Constitution and Order 51 Rules 1, 2 and 4 of the Civil Procedure Rules.

11. It was not brought under Order 42 Rule 6 of the Civil Procedure Rules, as it is based on the general principles of this court applying its inherent discretionary powers to give orders that serve the wider interests of fair justice. However, in my view, Order 42 Rule 6 of the Civil Procedure Rules should also have been relied upon by the applicant.

12. Having said so, this court can in appropriate cases apply its inherent powers to grant orders that ensure observance of due process and to do justice and secure fair trial between parties.

13. In our present case, the proceedings in Kericho Chief Magistrate's Civil Case No.462 of 2014 have been concluded for Kshs.2,204,394/- on 24th July 2018 and auctioneers have set in execution process against John Njogu the plaintiff in this court, who is also the applicant.

14. The said John Njogu has come to this court through a plaint seeking reliefs against his insurer, the defendant herein Invesco Assurance Co. Ltd to enforce the insurance terms and the suit is pending.

15. In my view this is a proper case for this court to exercise its inherent jurisdiction to protect the interests of the parties pending the hearing of the case herein. However, this court cannot at this stage issue a mandatory injunction against the defendant herein as requested in prayer 4 of the application, as that will amount to determining the main suit herein before it is heard.

16. I thus allow the application and order as follows-

i. Pending the hearing and determination of the main suit herein, there be and is hereby issued a stay of execution of the decree and all subsequent orders issued and proceedings in Kericho Chief Magistrate's Court Civil Case No.462 of 2014, provided this suit is heard by June 2020, otherwise at the end of June 2020, the stay orders herein will lapse.

ii. The costs of this application will be in the cause.

Dated and delivered at Kericho this 18th day of July 2019.

George Dulu

JUDGE