



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 16 OF 2019

MARY NZISA MUTHINI

ELIZABETH KATUMBI MUTHINI.....PLAINTIFFS/APPLICANTS

VERSUS

DIRECT LINE INSURANCE CO. LIMITED...DEFENDANTS/RESPONDENTS

AND

PETER MUSAU KIMENYI.....INTERESTED PARTY

RULING

1. The Plaintiffs/Applicants filed a Notice of Motion dated 9/5/2019 seeking the following reliefs:-

(1) Spent

(2) Spent

(3) An order do issue for the release of Motor vehicle Registration No. KCE 821G to the registered proprietor pending the hearing of the Application inter-partes.

(4) An order of stay of execution of decrees resulting in PMCC No.598 of 2014 and 546 of 2014 pending the hearing and determination of the suit.

(5) Costs be provided for.

2. The application is supported by the annexed affidavit of **Mary Nzisa Muthini** sworn on even date and further by grounds on the face thereof. The Applicants' case is that they are the administrators of the estate of one **Stephen Muthini Nzaku** (deceased) who was the registered proprietor of Motor vehicle registration No. KBF 682H which was involved in a road traffic accident along Nairobi – Mombasa Highway on the 25/12/2014 which motor vehicle had been insured by the Defendant vide Policy Number 3073710. It was also the Applicants case that two civil suits were filed at Mavoko law courts wherein judgements have ensued which have led to the attachment of the Applicants motor vehicle registration Number KCE 821 G yet the policy of insurance had been in force and valid. It is the Applicants contention that the Defendant has failed or ignored to defend the suits and thereby exposed the Applicants to imminent danger and leading to loss and damage to the estate of the deceased. Finally it is the Applicants case that the Defendant ought to be compelled by this court to make good all claims arising from the suits and covered by the policy.

3. The plaintiff in the primary suit vide **Mavoko PMCC No. 546 of 2014** was joined herein as an interested party and who vehemently opposed the application. The Interested party filed a replying affidavit sworn on 17/05/2019 where he raised several grounds of opposition *inter alia*: that he had already obtained judgement against the Applicants who later sought orders for stay which was granted by the trial court pursuant to a consent entered on 29/10/2018; that the Applicants failed to comply with the terms of the consent which paved way for the Auctioneer to proceed to execute the decree; that the present suit is a contractual obligation between the Plaintiff and defendant in which the interested party had nothing to do with it; that similar case arising from the same cause of action is still pending determination contrary to the assertions of the Applicants; that the interested party should not be unduly denied the fruits of the judgement.

4. The Defendant upon being served with summons to enter appearance duly entered appearance and filed a defence in which it denied ever issuing the owner of Motor vehicle registration No. KBF 682 H with a policy of insurance and further that the deceased ever owned the said subject vehicle at the material time when the alleged accident took place. However, the Defendant did not file a replying affidavit to the Plaintiff's application herein.

5. It was agreed that the application be canvassed by way of written submissions. However it is only the Applicant's counsel who filed submissions. It was submitted that the subject motor vehicle had a valid policy of insurance Number 3073710 which was due to expire on 11/1/2014 and that the Defendant was duly notified of the said accident but failed to do so leading to issuance of a decree against the Applicants. It was also submitted that it was a grave injustice for insurance companies to receive premiums only to turn against their clients when the risk insured occurs and thus the need for this court to come to the aid of the Applicants by granting an order of stay of execution of the decree pending the hearing and determination of the suit.

6. I have considered the Applicants application and the rival affidavits plus the submissions. It is not in dispute that two civil suits have been lodged at Mavoko Law Courts by persons who claim to have been injured while travelling in Motor vehicle registration No. KBF 682 H and that one of the cases namely **PMCC No. 546 of 2014** has reached execution stage wherein warrants of executions have been issued targeting the Applicants Motor vehicle registration Number KCE 821 G. It is also not in dispute that a consent was entered into by the Applicants and the Interested Party in **PMCC No. 546 of 2014** wherein the judgement was set aside and the Applicants were to file their defence, list of documents, statements and issues and to pay throw away costs of Kshs.7000/= within 14 days from the date of consent namely 29/10/2018 failing which execution to proceed. It is also not in dispute that the Applicants failed to comply with the said consent and hence the execution of the decree which has now compelled them to rush to this court for redress. The only issue for determination is whether the Applicants have presented sufficient reasons to warrant an order of stay of execution pending the determination of the suit herein.

7. The Applicants have claimed that the subject motor vehicle which had been involved in an accident namely KBF 682 H had a valid Insurance Policy Number 3073710 which was to expire on 11/01/2014 since the accident took place on the 25/12/2013. The Defendant in its statement of defence dated 27/05/2019 paragraphs 5, 6 and 10 has categorically denied ever issuing a policy of insurance over the said vehicle. The Applicants upon being served with the said defence have not filed a reply thereto and further have not availed to the court a copy of the contract of insurance or even the insurance sticker so as to show prima facie that such a contract existed between the registered owner of the accident vehicle and the Defendant. The Applicants at this stage have a duty to show that they have a good case against the defendant so as to warrant an order of stay of execution pending the determination of the suit. The Applicants have no choice but to discharge this burden in view of the fact that the interested party who was not a party to the contract of insurance is likely to be prejudiced if the stay is granted as he will not access the fruits of the judgement granted in his favour. The Applicants despite asserting that there was a contract of insurance have failed to avail the said contract of insurance or even an insurance sticker or receipt of payment of premiums. It seems the Applicants might be saving the documents for the main day during the hearing of the matter. However, this court needs to see the said documents so as to leave no doubt that indeed there existed a contract of insurance which was valid at the time of the alleged accident. In the absence of such evidence this court cannot be called upon to determine hypothetical issues. No reasons have been given by the Applicants as to why the said documents have not been availed. The Applicants cannot be allowed to hold the interested party at ransom yet he was not a party to the insurance contract. I find the interested party stands to suffer prejudice if the stay order is granted.

8. The consent entered on the 29/10/2018 between the Applicants and interested party is of crucial importance in the determination of the application herein. In that consent the Applicants were given an opportunity to defend the suit after the ex-parte judgement was set aside and that they were to pay throw away costs of Kshs.7,000/=. It appears the Applicants failed to go by the terms of the consent thereby warranting the execution of the decree. The Applicants have not explained as to why they are running away from that consent which had given them an opportunity to defend the suit even as they engaged the Defendant herein. I find that the Applicants have come to this court with unclean hands as they have failed to comply with the consent order. They entered into the consent willingly and now they cannot run away from it. Even if the Defendant was to come and take over the matters now pending before the lower court, the Applicants were expected to be prudent and to continue holding the fort as they engaged the defendant. Running away from the consent was a fatal mistake as the said consent had consequences for non-compliance. There is no evidence that the said consent has been set aside or varied and hence the same is still in force. If the interested party enforced the terms of the consent I do not see how he can be faulted. I am satisfied that the Applicant has not furnished sufficient reasons to justify an order of stay of execution pending determination of the suit. Further it is noted that one of the matters before the lower court namely **Mavoko PMCC No. 547/2014** is yet to be determined and as such it has not crystallized yet for a declaratory suit. The Applicants should wait until that suit is concluded before seeking an order of declaration for settlement of the resultant decree.

9. As to whether the Applicants will suffer loss and damage if an order of stay is not granted, the properties sought to be attached are movable in nature with values attached thereon and hence can be quantified so that in the event the suit succeeds in the end then the Defendant can easily compensate the Applicants. In any event the Defendant is a giant Insurance Company and will be in a position to compensate the Applicants for any losses incurred as a result of the outcome of the civil cases now pending at Mavoko Law Courts.

10. In the result it is my finding that the Plaintiff's application dated 9/5/2019 lacks merit. The same is ordered dismissed with costs to the interested party. The stay orders earlier granted are hereby vacated.

Orders accordingly.

Dated and delivered in open court at Machakos this 19th day of November, 2019.

D. K. Kemei

Judge