



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL CASE NO. 4 OF 2019

LILIAN ATIENO OMORO.....1ST PROPOSED INTERESTED PARTY/APPLICANT

RUTH MASAWA.....2ND PROPOSED INTERESTED PARTY/APPLICANT

RUTH MUHONJA.....3RD PROPOSED INTERESTED PARTY/APPLICANT

VITALIS KIPNGETICH RONO4TH PROPOSED INTERESTED PARTY/APPLICANT

BETWEEN

MICHAEL OBADHA.....PLAINTIFF/ 1ST RESPONDENT

VERSUS

INVESCO ASSURANCE CO. LTDDEFENDANT/ 2ND RESPONDENT

RULING

1. This Ruling determines the Notice of Motion Application dated 14.11.2019 brought under the provision of **Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 (2) (d) of the Constitution and the Omnibus Provision of the Laws.**

2. The 4 applicants **Lilian Atieno Omoro, Ruth Masawa, Ruth Muhonja and Vitalis Kipngetch Rono who are decree holders in various claims in Ukwala PMCC 55, 56, 64 and 127 of 2018** respectively seek to be enjoined to this suit as Interested Parties and in addition, they seek for review of the Orders of this Court made on 2.10.2019 which stayed execution of decrees in their respective suits pending hearing and determination of this suit.

3. The Plaintiff in this suit Mr. Michael Obadha is the defendant in the suits in Ukwala P.M's Court and the Judgment-Debtor therein whereas the Defendant in this suit is Invesco Assurance Company Limited and is the Insurer of the 1st Respondent's Motor Vehicle which was involved in an accident wherein the applicants were injured giving rise to the respective suits and decrees before Ukwala Principal Magistrate's Court. The vehicle in question undoubtedly belonged to the Plaintiff herein Michael Obadha, the Judgment-Debtor/Defendant in **Ukwala P.M.C.C. Nos 55, 56, 64 and 127 of 2018** wherein the applicants are Plaintiffs/Decree-Holders.

4. The application is supported by 6 grounds on the face thereof and affidavit in support sworn by Calistus Nyegenye Advocate. The applicants claim that the Orders of 2.10.2019 issued by this court staying execution of decrees and staying proceedings in the named suits adversely affects the interests of the applicants; that there is new evidence and facts that were not brought to the attention of the court by the plaintiff herein at the time of issuance of the said Order; that the Plaintiff obtained the Orders without involving the applicants yet the Orders adversely affect their interests; that the plaintiff misrepresented facts to the court and failed to defend himself in the lower court suits; that rules of natural justice and fair hearing demand that no one should be condemned unheard; and that in the interest of justice in all fairness, the applicants should be allowed to participate in these proceedings so as to agitate for their interests.

5. The supporting affidavit sworn by Calistus Nyegenye Advocate on 14.11.2019 reiterate the grounds in support of the Notice of Motion. In the said affidavit, Counsel emphasized in addition that the matters in Ukwala P.M's Court proceeded ex parte after the Plaintiff herein who was the defendant failed to defend the suits and that already, execution of decrees had commenced after paying further Court fees by the applicants herein who have no sufficient means to do so.

6. Counsel for the applicants further deposed that the plaintiff/Judgment-debtor/1st respondent herein is a dishonest man as he misled this Court in that after his Motor vehicle Registration No. KBY 767K was attached by Dasemy Auctioneers to satisfy the decree in **Ukwala PMCC 64/2018**, he transferred it in the name of his wife Mary Anyango Obadha in Order to defeat justice as the said Mary Anyango

Obadha filed Objection to attachment of the said motor vehicle.

7. That when the Decree-Holder opposed the Objection, the Judgment-Debtor/Plaintiff herein approached the deponent Counsel seeking for an amicable settlement and a consent was recorded in the said suit and that the said judgment debtor issued cheques some of which were dishonoured whereas the said judgment debtor/Plaintiff herein also lost KShs.33,000/= to third Parties while seeking to have his motor-vehicle released through the backdoor.

8. It was further deposed that prior to the Plaintiff approaching this Court, his four motor vehicles had been proclaimed by Dasemy Auctioneers hence he is not keen to satisfy decrees in the said suits. In addition, Counsel averred that the Orders of 2.10.2019 were issued without involving the applicants and that the Plaintiff is using Court process to shield himself from performing his legal obligations to the applicants in the lower Court.

9. Further, that the Insurance Company defendant herein was never cited as a third Party in the lower Court matters hence the plaintiff herein should not be allowed to use this Court to shield himself.

10. It was further deposed that some of the applicants suffered very serious permanent injuries/disabilities and that the only relief for them is to get the fruits of their judgment. Among the injuries are said to be loss of right forearm on the part of the 1st applicant, whereas the 2nd applicant miscarried and that the 4th applicant has a permanent scar on the right forearm.

11. It was therefore contended that the Plaintiff/judgment debtor should satisfy the decrees before he can seek for compensation from his Insurer. Counsel urged the Court to set aside Orders of 2.10.2019 to pave way for the Applicants to continue with execution of decrees in the lower court.

12. The Plaintiff/Respondent filed a replying affidavit sworn on 25.11.2019 by Mr. Darius Taremwa Advocate opposing the Applicant's Notice of Motion dated 14.11.2019 and deposing in contention that the application lacks merit and the same should be dismissed with costs.

13. Counsel deposed that there is no dispute that there is a judgment in favour of the interested Parties against the 1st Respondent herein. Further, that it is the Insurance Company (*defendant in this suit*) that is bound to satisfy decrees in the said suits because it insured the subject accident motor vehicle.

14. Further, that the main suit is based on a contract of Insurance in which the applicants are not privy to hence their being parties to this suit does not affect their interest. He cited the case of **Heritage Insurance Company Limited and Another v Gladys Kayalo Mmbo [2019] eKLR** where the Court held that Parties not being Parties to an Insurance contract claim have no interest to be affected and do not meet the legal threshold for enjoining in the suit.

15. It was further deposed in contention that lifting the Orders of stay will effectively render the main suit an academic exercise and be greatly prejudicial to the Plaintiff; that stay of Execution can only be lifted once the Court has conclusively made a determination on the question of validity of an Insurance Policy and Liability to third Parties; that the applicants herein have recourse in a declaratory suit where the liable party fails to pay hence their interests are well taken care of without their being enjoined to this suit as parties. Counsel urged the Court to dismiss the applicants' Notice of Motion.

16. The Parties' Advocates canvassed the Notice of Motion by way of submissions restating their client's positions as per the Notice of Motion, grounds, Supporting and Replying affidavits. I need not, therefore, reproduce the submissions which basically reiterated the pleadings and affidavits.

DETERMINATION

17. I have carefully considered the application dated 14.11.2019, the grounds in support thereof, the supporting affidavit and the Replying affidavit together with the detailed oral submissions made by counsel for the parties to the application. I have also considered the cited case law and Statutory provisions.

18. In my humble view, the main issues for determination are:

- 1. Whether the applicants should be enjoined to this suit as interested Parties;**
- 2. Whether the Orders of stay granted on 2.10.2019 affecting Ukwala PMCC Nos 55, 56, 64 and 127/2018 should be reviewed and set aside to pave way for execution of decrees in the said suits;**
- 3. What Orders should this Court make?;**
- 4. Who should pay costs of the application?**

19. On the 1st issue of whether the applicants should be enjoined as interested parties to this suit, the applicants assert that as they are Decree-Holders in the material suits in the lower Court, they are adversely affected by the stay Orders issued by this Court yet they are not Parties to this suit between the Judgment-Debtor and the Insurance Company. Further, that their right to a fair hearing and fair trial is violated unless they are enjoined to this suit so that they can ventilate their grievances.

20. On the part of the Respondent/Plaintiff, he contends that the applicants not being privy to the Insurance contract between the Plaintiff and

the Insurance Company, they should not be joined to this suit as their presence will in no way assist this Court to effectually and completely adjudicate on matters before this Court between the Parties.

21. Although Counsel for the Plaintiff in this suit vehemently resisted the application for joinder of the applicants as interested parties and cited some decisions where the courts declined joinder on account that the applicants were not parties to the contract of Insurance, the Supreme Court of Kenya in **Trusted Society of Human Rights Alliance VS. Mumo Matemu and 5 Others [2914] eKLR** held as follows regarding joinder of an interested Party:

“Suffice it to say that while an interested party has a “Stake/Interest” directly in the case, an amicus” interest is its fidelity to the law, that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Court room.

Consequently, an interested party is one who has a stake in the proceedings though he or she was not a party to the cause **ab initio**. He or she is one who will be affected by the decision of the Court when it is made either way. “Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champion his or her cause.” [emphasis added.]

22. The legal basis for joinder of Interested Parties is **Order 1 Rule 10(2) of the Civil Procedure Rules** which provides:

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, Order that the name of any Party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”[emphasis added/”

23. On matters Insurance, where there is a dispute between the insured and Insurance, which dispute also affects other parties who are not privy to the Insurance Contract, **Section 10 of the Insurance (Motor vehicle 3rd Party Risk Act)** provides:

5. No sum shall be payable by an Insurer under the foregoing provisions of the Section if in an action commenced before, or within three months after, the commencement of the proceedings. In which the judgment was given, he has obtained a declarant in that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false. In some material particulars, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

“provided that an Insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this sub-section as respects any judgment obtained in proceedings commenced before the commencement of that action unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto. [emphasis added]

24. The above provision of the law no doubt makes it mandatory for a plaintiff in a primary suit to be made a party in a declaratory suit between the Insurer and the insured. In **Gateway Insurance Company Limited v Moses Jaika Luvai [2008] eKLR**, Ibrahim J (as he then was) stated as follows regarding **Section 10 of the Act**:

“the aforesaid provision is clear and speaks for itself. The Plaintiff in the suits which the insurer seeks to avoid liability under Section 10(1) by way of a declaratory suit must be notified of the institution of the declaration suit and after which the said plaintiffs are entitled to be made parties to the Insurer’s suit if they think fit.

The provision is mandatory and Court has no discretion on the matter. The discretion and election lies with the plaintiff who have sued the Insured for damages and losses arising from motor accidents. It is a right which none of the parties or the Court can take away.” [emphasis added].

25. In the present case, it is not the Insurance Company that has sued seeking to avoid the policy but the Insured Claiming that his Insurer has constructively avoided the Policy by failing to honor the Insurance Policy which obliges that the insurer settles claims lodged by third parties. In such a claim, the Insurance company can and may as well file a counter-claim or cross suit claiming that it is entitled to avoid the policy of Insurance which binds the Defendant Insurance Company. In such circumstances, in my humble view, there is no doubt that the decision of this court will affect the rights and interest of the applicants herein. In my humble view, the applicants have a stake and/or interest in this case, as was stated in **Trusted Society of Human Rights Alliance v Mumo Matemu & Others (Supra)**.

26. The suit herein is initiated **under Section 10 of the Insurance motor vehicle 3rd Party Risk) Act** which makes it mandatory for the Insurer to settle judgments in respect of persons it has insured against claims by third parties. Such claims are for death or bodily injuries resulting from an accident involving the vehicle insured under the Act.

27. In this case, the applicants are affected by the stay Orders staying execution of their respective decrees and should the Defendant seek to avoid the policy by way of a cross suit or should the plaintiff herein lose out, the applicants shall be prejudiced.

28. The applicants in my humble view, ought to have been served with the plaint in this suit. They should also have been enjoined as

interested parties because they have a stake in the outcome of this suit.

29. Accordingly, I find merit in the prayer for joinder. I allow it and Order that the applicants shall be enjoined in this suit as interested parties. They shall be served with a plaint within 15 days of today and they shall in turn file their respective documentation if they so wish within 21 days of date of service of the plaint upon them.

30. On the second issue of whether the orders of stay of execution of decrees issued by this court on 2/10/2019 affecting the applicants decree- holders in **Ukwala PMCC Nos. 55, 56, 64 and 127/2018** should be reviewed and set aside to pave way for execution of the decrees by the applicants, the applicants claim that they were not parties to the said application hence they were not accorded a hearing and that the plaintiff herein is dishonest in that he came to this Court and obtained orders of stay after entering into a consent with the applicants' Counsel to settle decrees in the Ukwala suits and even made part payment thereof and issued postdated cheques one of which was dishonored. That the plaintiff is merely using this Court to defeat decrees in the lower Court as he has already transferred one of the motor vehicles, which had been attached in execution of decree in favour of his wife who filed objection to attachment proceedings.

31. On the part of the Respondent/Plaintiff, he contends that should stay Orders obtained be vacated then this suit shall be rendered an academic exercise.

32. I have perused the provisions of **Order 21 of the Civil Procedure Rules which relate to stay of Execution. Rule 25** relates to the Court's power to stay execution of a decree in a suit if the decree-holder is a defendant in another pending suit in which the judgment-debtor in the concluded one is the plaintiff.

33. There is no specific provision for stay of execution pending hearing and determination of a declaratory suit. It follows that granting stay of execution is in the discretion of this Court in these type of case, invoking the inherent jurisdiction of the Court.

34. The applicants have argued the stay ordered, if it remains in force, it paralyses their right to realize the fruits of their lawfully obtained judgments against the plaintiff insured herein.

35. I note that under **Section 4(1) of Cap 405**, the Liability of the Defendant herein is preserved as against the applicants decree-holders in that they are equally entitled to seek out to this Court under Sections 34 and 92 of the Civil Procedure Act to enforce the judgment and decrees against the Defendant insurer who is by law bound to settle such decrees, without the decree holders even filing declaratory suits against the defendant Insurance Company.

36. Nonetheless, the Plaintiff/Judgment-debtor and insured has taken up that burden of suing the Insurance Company. The only problem is that the plaintiff herein was, as correctly submitted by the Interested Parties' Advocates, dishonest in that he went on a spree of trying to defeat execution of lawful decrees by transferring his property to third Parties. He also issued cheques some of which were dishonored. However, such acts by the plaintiff can be reversed through tracing and institution of criminal proceedings for dishonored cheques. The Court has the power to Order for sale of such properties which were transferred in a bid to defeat decree of a Court of competent jurisdiction.

37. However, if this suit is heard and determined expeditiously, then the interested Parties will not be prejudiced in anyway as the plaintiff will have carried their burden and saved them the time and resources of suing the insurance Company which, it has not been shown, is on the verge of collapse.

38. The inconvenience caused to the applicants by the stay orders can be compensated by way of costs and other orders that this Court can make in the interest of Justice (see **NRB HCC 213/2014 Charles Makenzie Wambua v Africa Merchant Assurance Co. Ltd and Another [2014] eKLR**). In addition, the applicants can still seek for setting aside of the said orders and execution to proceed against the plaintiff should the insurance company go under as their claim is preserved both as against the plaintiff herein and the insurance company. For that reason, and as the plaintiff had made part payment in one of the cases in order to salvage his property; **and having allowed the prayer for joinder of the applicants as interested parties to this suit; I would make the following further Orders:**

1. That the stay orders granted on 2.10.2019 shall remain in force conditional upon the plaintiff:

1. Settling decree in the matter wherein he had issued cheques some of which were dishonored. The dishonored cheque (s) to be made good within 30 days of the date hereof.

2. The Plaintiff paying to the interested Parties/Decree-Holders all the cleared further Court fees in the matters named within 30 days of today.

3. That the Plaintiff do pay to each of the interested Parties hereto thrown away costs of KShs.10,000/= , within 30 days of this Order unless enlarged by the Court.

4. In default of any of the conditions stated above, unless varied by this court, the stay Orders granted on 2.10.2019 shall lapse and the interested parties shall be at liberty to execute their respective decrees and/or proceed with the prosecution of pending matters.

39. Orders accordingly.

Signed, Dated and Delivered at Siaya this 16th day of December, 2019.

R.E. ABURILI

JUDGE

In the presence of:

Mr. Taremwa Advocate for the Plaintiff/1st Respondent

N/A for the Applicants/Interested Parties

N/A for the Defendant 2nd Respondent