



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE OF 1 OF 2016

BRITISH AMERICAN INSURANCE CO. LTD..... PLAINTIFF/RESPONDENT

VERSUS

JULIUS MAMALI KANAALI DEFENDANT/APPLICANT

RULING

The applicant by a notice of motion dated 20th January, 2016 and filed in court on 20th January, 2016, the applicant seeks the following orders:

- (a) That this application be and is hereby certified urgent and heard ex-parte in the first instance.**
- (b) That this honourable court be and is hereby pleased to order stay of execution of the warrants of attachment given on 7th January, 2016 in Kajiado CMCC No. 248 of 2014 Peter Muema & John Matoi (suing as personal representatives of the late Joseph Nyamasyo Musyoki) versus Joseph Mamayi Kanari, Kabiru Mwangi Njuguna and Cyprian Kanake Ambao pending the hearing and determination of this suit.**
- (c) That this Honourable court be and is hereby pleased to order stay of execution of the warrants of attachment given on 7th January, 2016 in CMCC No. 248 of 2014 Peter Muema & John M. Matoi (Suing as personal representatives of the late Joseph Nyamasyo Musyoki) versus Joseph Mamayi Kanari, Mwangi Njuguna and Cyprian Kanake Ambao pending the hearing and determination of this application and suit.**
- (d) That this honourable court be and is hereby pleased to order stay of execution of the proclamation of attachment of movable property notice issued Kajiado CMCC No.248 of 2014 and served upon the applicants on 14th January, 2016 pending the hearing and determination of this suit.**
- (e) That there be a declaration that the respondent is bound to honour and /or satisfy warrants of attachment issued against the applicant in Kajiado CMCC No.248 of 2014 in the sum of Ksh. 837,997 as at 7th January, 2016 as well as the Auctioneer's charges.**
- (f) That the applicants be at liberty to apply for further orders and /or directions as the honourable court may deem fit and just to grant.**
- (g) That costs of this application be provided for.**

The application is supported by thirteen grounds on the face of the motion and an affidavit in support of one Julius Mamali, Kanaali with annexures denoting that execution has commenced to realize the fruits of the judgements from various courts. The stated grounds are couched in the following manner:

1. On 14th January, 2016 Jovan H. Kariuki T/A Moran Auctioneers acting on the instructions of Amutallah Robert & Company advocates served the applicant with a seven (7) day proclamation of movable property notice pursuant to warrants of attachment given on 7th January, 2016 for the sum of Kshs. 837,997/- issued in Kajiado CMCC No. 248 of 2014 Peter Muema & John M. Matoi (Suing as personal representatives of the late Joseph Nyamasyo Musyoki versus Joseph Mamayi Kanari, Kabiru Mwangi Njuguna and Cyprian Kanake Ambao, (hereinafter referred to as the insurance policy)
2. At all material times, the respondent was the insurer of the Motor Vehicle Registration No. KSZ 300 by virtue of insurance policy Number 552/800/1/002532/2013/03. (Hereinafter referred to as "the insurance Policy").

3. On or about the 30th July, 2014, the Kajiado matter was filed against the applicant and two others as the owners and/or driver of Motor Vehicle Registration No. KSZ 300 aforesaid seeking general and special damages and costs for the fatal injuries sustained in an accident that occurred on 14th day of January, 2014.
4. The applicant was served with the pleadings in the Kajiado matter aforementioned and forwarded the same to his insurance broker, four M. Insurance Brokers Limited whom in turn forwarded the same to its principal, the respondent since the aforementioned motor vehicle was comprehensively covered by the respondent.
5. Consequently, the respondent appointed the firm of Kiogora Mutai & Co. advocates to come on record for the applicant in the Kajiado matter on 29th August, 2014.
6. That the said firm of Kiogora Mutai & co. advocates appointed by the respondent then received instructions to concede on quantum in their submissions filed in the Kajiado matter on 3rd September, 2015 despite not attending the hearing of the case on 13th August, 2015.
7. That the applicant was not called to testify in the Kajiado matter by the respondent or their duly appointed advocates, Kiogora Mutai & Co. advocates.
8. That on 14th October, 2015, the applicant and two others were jointly and severally ordered to pay the plaintiffs in the Kajiado matter the sum of Kshs.667.640/- plus costs and interest.
9. That the plaintiffs in the Kajiado matter caused the decree to be extracted and on 7th January, 2015, warrants of attachment were issued to Jovan H. Kariuki T/A Moran Auctioneers to recover the sum of Kshs. 837,997 being the decretal sum, costs and interest.
10. The applicant who was the 1st defendant in the Kajiado matter was then served with seven (7) day proclamation notice by the aforesaid Auctioneers on 14th January, 2016 and upon forwarding the same respondent who had defended the Kajiado matter for settlement, the respondent declined to pay citing the existence of the instant suit.
11. The applicant avers that the respondent herein is liable to satisfy the aforesaid judgement, decree and warrants of attachment and auctioneers charges.
12. In view of the foregoing, it is in the interest of justice that the warrants of attachment given on 7th January, 2016, be stayed and the respondent be compelled to satisfy the judgement, decree and warrants issued against the applicant.
13. Unless this court issued the orders sought as a matter of urgency, the applicant will be greatly prejudiced hence the urgency of this application.

Background

On 30th July, 2014 the applicant was sued by Peter Muema and John Matoi as personal representatives to the estate of Joseph Musyoki in CMCC No. 248 of 2014 seeking general and special damages plus costs of the suit. The claim was based on a motor vehicle accident which on or about 14th January, 2014 along Maasai Road next to Nazarene University within Ongata Rongai. It is averred in the plaint that in the said accident which involved Motor Vehicle Registration No. KSZ 300 was being driven by the applicant/1st defendant in the primary such and duly registered in the 2nd and 3rd defendants therein.

The trial Magistrate heard the case inter-parties. In a judgement delivered on 14th November, 2015 the learned trial Magistrate awarded a sum total of Kshs. 667,640 plus costs and interest. The plaintiffs who prosecuted the claim before the court below and obtained judgement in their favour moved under order 22 of the civil procedure rules to enforce and execute the decree against the 1st defendant/applicant.

Being dissatisfied with the issuance of warrants of attachment and proclamation against the insurer – British American Insurance filed a plaint against the defendant formerly 1st defendant in the original suit. In the new suit before the High Court the plaintiff – British American Insurance Company limited sought a declaration that the plaintiff is entitled to avoid or repudiate policy No. 552/800/1/0025/2013/03 and costs of the suit.

The applicant felt unhappy about the declaratory suit whereas the trial court judgement which ordered that the plaintiffs be paid general and special damages has not been paid by the insurer (plaintiff) in HCC No. 1 OF 2016. By this notice of motion, the applicant applied for stay of execution of the warrants issued on 7th January, 2016 in CMCC No. 248 of 014 pending the determination of this suit.

The applicant's submissions suffice to say that the applicant's submissions filed during the inter-partes hearing is basically extracted from the affidavit and grounds on the body of the motion.

The applicants counsel contends that since he had a valid insurance with the plaintiff at the time of the accident the foresaid decree should be settled to avoid the proclamation and attachment of his goods. Counsel further submitted that an order of stay of execution of the judgement and warrants of attachment of the lower court given on 7th January, 2016 in respect of CMCC No. 248 of 2014 is necessary to avail the determination of the suit on the merits. The applicant counsel cited the provisions of the insurance Act and the insurance (Motor Vehicles Third Party Persons Act cap. 405, section 3A (1) and 54 respectively as the vases that the discretion of the court should be exercised in his

favour. He also submitted that upon receipt of the summons of the suit in the lower court he forwarded them to the insurer (Britam) and there has been no notice that it would not be liable to settle the claims.

Learned counsel further submitted that the suit filed against him has strong prospects of success in his favour making the order of stay and prohibition of the warrants in the limited period plausible.

The Respondent's Case

On the part of the respondents counsel his case was well grounded on the affidavit and the plaint filed against the defendant/applicant. The respondent counsel submitted briefly on five grounds on the competency of the notice of motion and the court's jurisdiction to make the orders sought in the motion. In the said grounds:

1. Whether this Honourable Court should order stay of execution of the warrants of attachment given on 7th January 2016 in Kajiado CMCC No. 248 of 2014 Peter Muema & John M. Matoi (Suing as Personal Representatives of the Late Joseph Nyamasyo Musyoki) Versus Joseph Mamayi Kanari, Kabiru Mwangi Njuguna and Cyprian Kanake Ambao pending the hearing and determination of this application

2. Whether this Honourable Court Should Order stay of execution of the warrants of attachment given on 7th January 2016 in Kajiado CMCC No. 248 of 2014 Peter Muema & John M. Matoi (Suing as Personal Representatives of the Late Joseph Nyamasyo Musyoki) Versus Joseph Mamayi Kanari, Kabiru Mwangi Njuguna and Cyprian Kanake Ambao pending the hearing and determination of this application

3. Whether this Honourable Court should order stay of execution of the proclamation of attachment of movable property notice issued Kajiado CMCC No. 248 of 2014 and served upon the applicants on 14th January 2016 pending the hearing and determination of this application and suit.

4. Whether there should be a declaration that the respondent is bound to honour and/or satisfy warrants of attachment issued against the applicant in Kajiado CMCC No. 248 of 2014 in the sum of Ksh. 837,997 as at 7th January 2016 as well as the Auctioneer's charges

5. Whether this Honourable Court should grant any further orders and/or directions as it may deem and just to grant

He submitted that the application as filed is misconceived as it is filed on the wrong forum misled of the execution court. Counsel therefore prayed to this court to dismiss the application and decline to exercise any discretion in the matter. He relied on Order 22 Rule 22(1) Order 51, Rule 18, Section 63E of the Civil Procedure Act.

The Law and Determination

It is trite that the law governing stay of execution from an order or judgement of the lower court to an appellate court is anchored in order 42 rule 6 of the civil procedure rules. The general legal principles are also found in the various decided cases by the superior courts. To start with the general policy framework is that a successful litigant should not be denied the fruits of judgement on grounds that an appeal has been filed on the ruling or judgement.

Under order 42 rules of the civil procedure rules it provides that: "***Nor order for stay of execution shall be made under Sub Rule (1) unless:***

(a) the court is satisfied that substantial loss shall may result to the applicant unless the order is made and that the application has been made without unreasonable delay and

(b) such security as the court orders for the one performance of suit a decree or order as may ultimately be bounding on him has been given by the applicant."

The manner in which the notice of motion is framed there is no contest that the applicant reliefs are not grounded in order 42 rule 6 of the Civil Procedure Rules. These guiding principles which I refer to as the three – tier pronged approach under order 42 rule 6 are meant for orders of stay of execution of judgement pending the determination of an appeal filed by an appellant. The court then considers the circumstances so as not to render the appeal nugatory. The applicant/defendant is not contesting the judgment of the lower court in CIMCC 248 of 2014 on both liability and damages.

As the pleadings stated he was the 1st defendant in that suit. The plaintiffs who filed a claim against him and two others succeeded and obtained judgment subject matter of the warrants and attachment in this notice of motion.

The core issue for this court's determination is whether stay of execution already in progress before the lower court should be stayed pending the hearing and determination of HCC No. 1 of 2016?

The suit is seeking a declaration by the insurer as against the insured/defendant to repudiate the policy which in turn had covered the risks on the facts and circumstances of the judgement in CMCC No. 248 of 2014.

In the instant case the applicant is not raising the three tests under order 42 Rule 6 of the Civil Procedure Rule because there is no appeal

filed or pending from the judgment of the trial court. In contrast the defendant/applicant is the judgment debtor in CMCC 248 of 2014 who has also not preferred an appeal. He has found himself before this court by reason of the suit by the plaintiff who insured the motor vehicle registration No. KSZ 300 involved in an accident subject matter of the claims lodged by the plaintiffs.

In the notice of motion for stay of execution of the warrants the applicant/defendant is saying that he had a valid policy with the plaintiff. The sums involved in the judgement delivered is colossal and yet the insurer has declined to come through for him. As a result, he is facing the risk and danger of being attached to satisfy the decree notwithstanding he had a contract of insurance with the plaintiff.

In this suit the applicant is impliedly saying that there is danger that when the decree and accumulation of interest his properties might not even be sufficient to satisfy the decretal amount.

It would be proper at this sate to set out some of the observations made by the court in the case of *Global Tours and Travels Ltd WC No. 43 of 200 UR* where the court held:

“Whether or not to grant a stay of proceeding or further proceedings on a decree or order appealed from this matter of judicial discretion to be exercised in the interest of justice such discretion is unlimited save that by virtue of its character as of judicial discretion it should be exercised rationally and not capriciously or whimsically” – the sole question is whether it is in the interest of justice to order a stay of proceedings and it is on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And considering those matters it should bear in mind such factors as the need for expeditious disposal of the same, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one. The scarcity and optimum utilization of judicial time and whether the application has been brought timeously”

The gist of the applicant’s notice of motion does necessarily fall within the ambit of order 42 Rule 6 of the Civil Procedure Rules. The elaborate issues and the court’s jurisdiction can be exercisable under the inherent powers donated by section 3A as read with 3A of the Civil Procedure Act.

In *Halsbury’s laws of England 4th Edition volume 37* the learned authors stated as follows interalia that:

“In sum it may be said that the inherent jurisdiction of the court is a vivite and viable doctrine and has defined as being the reserve or fond of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them” See also *Waweru Wanguku v Kamau Kama 1982 – 1988 1 KAR 780*)

The court in the case of *Intel corporation v Via Technologies Inc. 2002 3 HKC 650* stated that:

“in stay of proceedings the court must consider what would serve the ends of justice between the parties to the litigation and the administration of justice generally a stay should cause an injustice to the plaintiff. The applicant for stay must satisfy the court that continuing the proceedings would be unjust to him. Where the plaintiff continues proceedings as of right he should not be deprived of the right to continue those proceedings in the absence of very good reasons. In considering the interest of justice, plainly one must consider the claims of both parties (See *Bertel Ltd v Balt Brassiere Co. Ltd 1970 RPC 469*).”

A general principle among others applicable to all legal proceedings is the right to a fair hearing. The African Commission on Human and People’s Rights solemnly states that:

“right of a fair hearing to include equality of arms between the parties to a proceeding, whether they be administrative, civil, criminal or military”

It is of interest to observe that the notice of motion before this Superior Court has a correlation with parallel execution proceedings in the subordinate court. Though the claim in both courts cannot be said to be entirely identical but the heart of the two actions is the same.

Applying this approach to the facts of this case the insurer, has invoked its right of seeking a declaration to avoid the policy against the insured with regard to the subject matter in CMCC No. 248 of 2014.

When I apply the above principles to the facts of this. It is indeed clear that the civil procedure Act has no express provisions on stay of proceedings. The guiding principles that emerges out are all from the authorities of the superior courts. The nature of the action compels one to draw jurisdiction from the inherent powers of the court under section 3 and 3A of the Civil Procedure Act.

Keeping in mind these principles the plaintiffs hereby moved the court against the defendant for a declaration to repudiate the policy of insurance. The defendant who is a judgement debtor in CMCC No. 248 of 2014 had a legitimate expectation that the insurer would settle the claims arising out of judgement by virtue of the plaintiff having insured against the risk which resulted in him being sued by the claimant. That does not seem to be the case as the plaintiff insurer intends to seek sweeping orders to deny the defendant from relying on the terms of the policy to satisfy the decree.

As explained by the defendant the plaintiffs were initially served with the court summons and the plaint resulting in the judgement that seek

to have him attached in order to settle the claim. Given the significant overlap of issues between this case and the pending execution process before CMCC 248 of 2014 there is need to conserve and maintain status quo to prevent the judgement creditors from enforcing the decree until the pending suit herein is determined.

The broad discretion to stay proceedings is justified to enable this court control and manage this case docket and to determine the compelling right arising from the policy document of insurance. I bear in mind that in granting stay I have weighed the fact that the plaintiffs in CMCC 248 of 2014 are not parties to this present suit. Further the compelling interest between the plaintiff and the defendant has a possible damage, hardship or inequity to be suffered in the event the execution process is not stayed. I think it should always be remembered discretion of a court in this view of cases is usually case specific because there are no two cases which have identical set of facts.

However, having considered the submissions I do not agree with the respondent's counsel that this court lacks the jurisdiction to entertain the matter. I have found that the case pending before me comprises a substantive triable issue which if successfully disposed off has a direct bearing with the decree in CMCC 248 of 2014. The purpose why the defendant/applicant insured the subject motor vehicle involved in the accident claim in the primary suit was to cover himself on any risk which might arise in the course of using the motor vehicle.

In my view considering these factors and the state of affairs the defendant finds himself in, on the suit which has been filed by the plaintiff to repudiate the policy, stay of the trial court execution proceedings be and is hereby stayed pending resolutions of the dispute.

As a result, no further proclamation or warrants of attachment or notification of sale shall be issued by the plaintiffs on their own behalf, agents, servants, employees purporting to enforce the decree in CMCC No. 248 of 2014 until further orders are issued by this court. The costs of this application to abide the outcome of the main suit.

Dated, signed and delivered in open court at Kajiado this 1st day of November, 2018.

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R. NYAKUNDI

JUDGE

In the presence of

Mr. Mona holding brief for Macharia for the defendant