



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 757 OF 2016

INVESCO ASSURANCE COMPANY LIMITED.....APPELLANT

- V E R S U S -

TIMOTHY MACHARIA GIOCHE.....1ST RESPONDENT

MURIAMA BLESSED ENTERPRISES LIMITED..... 2ND RESPONDENT

CO-OPERATIVE BANK OF KENYA LIMITEDGARNISHEE

RULING

1. The appellant herein took out the motion dated 16.12.2016 in which it sought for the following orders *inter alia*:

THAT this honourable court be pleased to stay the execution of the Garnishee Order absolute and/or stop any release of monies from account Number 01136068932800 held by the appellant/applicant herein with Co-operative Bank of Kenya Ltd, Kimathi Street Branch pending the hearing and determination of the appeal.

2) The motion is supported by two affidavits of Leonard Njenga.

When served, the 2nd respondent filed grounds of opposition and the replying affidavit of Livingstone Maina Ombete to oppose the application.

3) I have considered the oral submissions of learned counsels and the material placed before this court. It is the submission of Mr. Gichuki King'ara, Learned advocate for the appellant, that the 2nd respondent filed a garnishee application against the 3rd party dated 27th October 2016. The aforesaid application was heard and determined in favour of the 2nd respondent by Hon. Muholi, learned Senior Resident Magistrate. The appellant avers that it was aggrieved by the decision of the learned Senior Resident Magistrate hence this appeal.

4) The appellant now seeks for an order for stay of execution pending appeal. Mr. King'ara argued that unless the order for stay of execution is given, the appellant stands to suffer substantial loss since its monies amounting to ksh.6,310,691/25 currently garnisheed shall be put beyond its reach thus rendering the appeal nugatory. The appellant proposed to deposit the aforesaid money in court or in a joint account between the parties and or their advocates. The appellant further admitted that it made several applications of similar nature before the trial court but none was successful for one reason or another.

5) The 2nd respondent vehemently opposed the motion arguing that the same is predicated upon an

incompetent appeal. The respondent pointed out that the appellant had before the trial court sought for an order for stay of execution which application was dismissed on 14.12.2016. It is also submitted that the trial court declined the appellant's request to it to set aside its judgment.

6) The respondent further argued that the appellant was required to seek for leave to appeal against the decision pursuant to the provisions of Section 75(1)(h) of the Civil Procedure Act and Order 43 of the Civil Procedure Rules, 2010. For this reason, this court was urged to find that there is no competent appeal before this court which the appellant can find an order for stay of a garnishee order made absolute. The respondent further pointed out that there was no evidence that the appellant would suffer substantial loss.

7) Having considered the rival submissions and the material placed before this court, I think it is important to set out the chronology of events in this matter before determining the motion. The appellant is an insurance company authorised to insure motor vehicles against third party risks. In 2006, the appellant insured the 2nd respondent's motor vehicle registration no. KAS 867Y. The aforesaid motor vehicle is the accident motor vehicle in this matter.

8) On 3rd May 206, one John Kariuki Githiga, a passenger aboard the aforesaid motor was injured as a result of a road traffic accident involving the motor vehicle. He thereafter filed Nairobi C.M.C.C. No. 11268 of 2006 seeking compensation for the injuries he suffered as a result of the accident.

9) The 2nd respondent informed the appellant of the accident and the subsequent suit filed against him.

10) The appellant then took over the 2nd respondent's defence by appointing its advocates. In the end, the suit was heard and determined in favour of John Kariuki Githiga who was awarded both general and special damages.

11) There is no evidence to show whether the appellant's advocates appealed against the decision of the trial court on liability and quantum.

12) As a consequence, the decree holder namely, John Kariuki Githiga, proceeded to execute the decree by attaching and selling motor vehicle registration no. KBR 210B belonging to Timothy Macharia Gioche, the 1st respondent herein.

13) The 1st respondent then filed an action against Muriama Blessed Enterprises Ltd, the 2nd respondent. The aforesaid suit is the action which gave rise to these proceedings.

14) It is clear in my mind that since the vehicle sold belonged to the 1st respondent who had then sued the 2nd respondent, the 2nd respondent had no plausible defence to resist the 1st respondent's claim. The record shows that the 2nd respondent successfully applied to issue a Third Party Notice upon the appellant.

15) There is also evidence that the 2nd respondent served the Third Party Notice with the plaint and witness statements and the order granting leave. The appellant despite being served with the aforesaid documents, failed to enter appearance prompting the 2nd respondent to successfully apply for entry of judgment in default of appearance against the appellant.

16) The 2nd respondent obtained a partial judgment against the third party in default of appearance on 9th May 2013 and gave notice of its entry to the appellant.

17) The 2nd respondent proceeded to execute the partial judgment against the third party (the appellant). Upon being served with a proclamation notice, the appellant was prompted to act by filing the motion dated 26.7.2013 seeking to set aside the default judgment of 9th May 2013.

18) The application was heard and determined in favour of the appellant as follows:

i. The default judgment against the Third Party was set aside on condition that the appellant deposits the decretal sum in court within 14 days from the date of ruling.

ii. The 3rd party (appellant) to file its defence within 14 days from the date of the ruling.

iii. In default the 2nd respondent to execute the decree.

19) The appellant did not comply with the terms set by the trial court for the setting aside of the default judgment and neither did the appellant file a defence within the 14 days.

20) The 2nd respondent applied for the garnishee order when it realised that the appellant had not complied with the conditions for setting aside the default judgment and for filing a defence. This application prompted the appellant to file an application for review to allow it to prosecute its defence which had been filed out of time and in defiance of the court order.

21) The suit was eventually fixed for hearing. It proceeded for hearing *ex parte* when the appellant and its counsel failed to avail themselves in court despite having notice.

22) By its letter of 4.7.2016 the appellant was notified of entry of judgment made on 24.6.2016. This notice prompted the appellant to file an application to set aside the *ex parte* judgment vide the application dated 15.7.2016 which application was dismissed for want of attendance on the part of the appellant.

23) The record further shows that the 2nd respondent revived its efforts to obtain a garnishee order against Co-operative Bank of Kenya Ltd, the appellant's bankers on 5th October 2016 forcing the appellant to file the application dated 12th October 2016 seeking for a stay of execution and to set aside the judgment and decree of the trial court. This application was heard and dismissed on 14.12.2016.

24) The appellant was not deterred and went ahead to file another application which is similar to the one now before this court. It would appear the appellant abandoned the one before the trial court when it obtained *ex parte* orders before this court.

25) I have taken time to go through the material placed before this court to get to the bottom of this dispute. I am satisfied by the submissions of the 2nd respondent that the appellant is hell bent to frustrate the 2nd respondent's right to enjoy the fruits of its judgment. I am convinced that the appellant's conduct of filing a plethora of applications amounts to a gross abuse of the court process. I am also convinced that the appellant was required to obtain prior leave under Section 75(1) (h) of the Civil Procedure Act and under Order 443 of the Civil Procedure Rules, before filing this appeal but unfortunately it failed to do so. In the circumstances, the appeal is rendered incompetent hence the current motion, the subject matter of this ruling lacks foundation.

26) On the basis of the above reasons, I find the motion to be incompetent and without merit. The same is dismissed and struck out with costs to the 2nd respondent.

Dated, Signed and Delivered in open court this 2nd day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent