Al-Amin Cargo Services Limited v Trident Insurance Company Limited & another (Civil Appeal E247 of 2024) [2025] KEHC 230 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEHC 230 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E247 OF 2024

JK NG'ARNG'AR, J

JANUARY 23, 2025

BETWEEN

AL-AMIN CARGO SERVICES LIMITED ..... APPELLANT

AND

TRIDENT INSURANCE COMPANY LIMITED ..... 1ST RESPONDENT

LUCY NYOKABI NYAMBURA ..... 2ND RESPONDENT

RULING

1. The Appellant/Applicant filed a Notice of Motion application dated 28th August 2024 under Certificate of Urgency pursuant to Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 42 Rule 6 (6), Order 40 Rule 10 (a), and Order 51 Rule 1 of the *Civil Procedure Rules*, and all other enabling provisions of the law.

2. The Applicant prays that pending the hearing and determination of the appeal, this court be pleased to issue an order restraining the 2nd Respondent either by herself or her authorized agents, servants and/or employees from alienating, removing, selling, disposing of whether by private treaty or auction or in any other manner whatsoever interfering with the Plaintiff's property, and that costs of the application be provided for.

3. The application is premised on grounds on its face and the Supporting Affidavit of Abdul Razak Omar Al-Amin, the Director of the Appellant, sworn on 28th August 2024 that by a comprehensive policy of insurance number 04/XP/110xxxx (also 04/110xxxx), the 1st Respondent in consideration of the premium then paid by the Appellant to it agreed to absolve, indemnify and/or hold indemnified the Appellant from any/all actions, proceedings, procedures, process, liability, claims, costs, and expenses in relation to, arising out of the use of Motor Vehicle Registration Number KBA 433Q. That on or about August 2012, the 2nd Respondent's authorized driver was allegedly driving motor vehicle registration number KBS 667K along Mombasa-Nairobi Highway at Mtito Andei when the said motor

vehicle was allegedly hit by the Appellant's motor vehicle registration number KBA 433Q/ZD 657Z. That as a consequence, the 2nd Respondent's motor vehicle was extensively damaged. That by way of an amended Plaint dated 18th September 2018 filed in Makindu being CMCC No. 337 of 2015, *Lucy Nyokabi Nyambura v Josephat Kimani & Al-Amin Cargo Services Limited*, the 2nd Respondent, on account of the damage on her motor vehicle sued the Appellant for the sum of Kshs. 699,634 plus costs and interest.

4. That the suit was heard and determined, and judgment entered on 15th November 2023 in favour of the 2nd Respondent for the sum of Kshs. 699,634.00 plus costs and interest. That the Appellant had legitimate expectation that the 1st Respondent would fully indemnify and/or absolve the Appellant from the 2nd Respondent's claim for damages and costs. That despite notifying the insurance of the accident and the resultant judgment, the 1st Respondent has in breach of the policy of insurance and without any justifiable cause, refused, declined and/or neglected to pay the decretal sum. That in execution of the decree, the 2nd Respondent through its authorized agents Betabase Auctioneers, proclaimed the Appellant's properties for purposes of sale to recover the decretal sum. That consequently, the Appellant instituted Mombasa CMCC No. 109 of 2024, *Al-Amin Cargo Services v Trident Insurance Co. Ltd & Lucy Nyokabi Nyambura* seeking that the 1st Respondent is entitled to settle the decree against its insured, the Appellant herein.

5. That the Appellant filed an application dated 6th February 2024 seeking an injunction to restrain the 2nd Respondent from alienating, selling and/or disposing off any of the Appellant's property pending the hearing and determination of the declaratory suit which was instituted for the benefit of the 2nd Respondent. That the application was heard by the court and a ruling slated for 8th August 2024. That on the day the matter was fixed for ruling, the 1st Respondent did not oppose the contents of the Appellant's application as they neither entered appearance nor filed any response. That on 8th August 2024, the court deferred the ruling and delivered it on 13th August 2024 where the court had dismissed the Appellant's application on grounds that the Appellant had failed to attach a notification to the insurance of the resultant judgment which the 1st Respondent had allegedly disputed in its statement of defence filed a day prior to delivery of the ruling, which defence was not served upon the Appellant.

6. The Appellant being dissatisfied with the decision appealed against it and believes it is arguable and warrants grant of an injunction. That the 2nd Respondent commenced the process of execution against the Appellant and served it with warrants of attachment and a proclamation notice dated 26th August 2024 which gave the Appellant 7 days to settle the decretal sum failure to which the said proclaimed motor vehicle which is the Appellant's only source of income will be auctioned. That if the order of injunction pending appeal is not granted pursuant to Order 42 Rule 6 (6), the motor vehicle will be sold rendering the appeal an academic process. That the Appellant will have been punished for the 1st Respondent's breach of a valid policy of insurance and the mandatory provisions of *Cap 405* Laws of Kenya. That the Respondents stand to suffer no prejudice if the said orders are granted.

7. The 2nd Respondent filed a Replying Affidavit sworn on 11th September 2024 that she is a complete stranger to the insurance contract between the Appellant/Applicant and the 1st Respondent, she is not privy to terms of the said policy and the same cannot be a basis for denying her access to the fruits of judgment issued in her favour. That it has been almost one year since delivery of the judgment and the Appellant/Applicant has made no effort to settle the said judgment but only waited for the process of execution to be commenced then rushed to file Mombasa CMCC E109 of 2024 with an application seeking interim injunctive orders restraining the 2nd Respondent from executing the judgment. That the application was dismissed for the Appellant/Applicant's failure to satisfy requirements for grant of orders of temporary injunction sought against the 2nd Respondent herein.

8. The 2nd Respondent further stated that the Memorandum of Appeal raises no triable issues as the Appellant/Applicant is not entitled to injunctive orders against the 2nd Respondent staying execution of the judgment obtained in Makindu CMCC No. 377 of 2015 which the Appellant/Applicant has never appealed. That having obtained a valid judgment, the 2nd Respondent is entitled to it fruits and execution in itself is a lawful process. That putting the process of execution in motion does not amount to substantial loss and completion of execution also does not amount to substantial loss under Order 42 Rule 6 of the *Civil Procedure Rules*. That whereas an insured may well be entitled to seek a declaration that its insurer is liable to settle the claims covered under the insurance policy, that statutory right of action does not bar a decree holder from executing the decree issued in his favour against the insured directly. Consequently, the 2nd Respondent is not barred by the declaratory suit from executing against the Appellant/Applicant directly.

9. The 2nd Respondent maintains that the declaratory suit in Mombasa CMCC No. E109 of 2024 seeks declaratory orders against the 1st Respondent for breach of the contract of insurance whereas the primary suit being Makindu CMCC No. 377 of 2015 is a claim for negligence arising out of an accident hence the statutory right of action the applicant has against the 1st Respondent does not bar the 2nd Respondent from executing the decree issued against the Appellant/Applicant. That litigation must come to an end and should the Appellant's application herein be allowed, the 2nd Respondent and by extension her insurer will be extremely prejudiced as they will be kept from enjoying fruits of the judgment for an indefinite period of time as they cannot predict how long it will take to determine the appeal. That the Appellant/Applicant has not offered security for due performance of the decree in favour of the 2nd Respondent or for security for costs herein should the appeal be dismissed hence they should not be granted the prayers sought. That in the event court grants the orders sought, the Appellant/Applicant should pay the full decretal sum plus accrued interest thereto to hold in an interest earning account as security for performance of the decree.

10. The application was canvassed by way of written submissions. The Appellant/Applicant filed submissions dated 15th October 2024 while the Respondent filed submissions dated 11th October 2024.

11. I have considered the Notice of Motion application dated 28th August 2024, the 2nd Respondent's Replying Affidavit sworn on 11th September 2024 and submissions by the parties. The issues for determination are whether the application is merited for grant of the order of temporary injunction pending determination of the appeal and who should bear costs.

12. The application herein is premised on Order 42 Rule 6 (6) of the *Civil Procedure Rules* which provides as follows: -

    Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

13. The Appellant instituted Mombasa CMCC No. 109 of 2024, *Al-Amin Cargo Services v Trident Insurance Co. Ltd & Lucy Nyokabi Nyambura* for the 1st Respondent to settle the decree against its insured. The Appellant then filed an application dated 6th February 2024 seeking for an injunction pending the hearing and determination of a declaratory suit. Ruling was delivered on 13th August 2024 and the Appellant being dissatisfied filed a Memorandum of Appeal dated 16th August 2024. The Appellant is therefore deemed to have complied with the procedure for instituting an appeal for the court to exercise its discretion to grant temporary injunction.

14. This court is then required to determine whether the Applicant has met the principles for grant of interlocutory injunction which are set out in *Giella v Cassman Brown & Company Limited* (1973) EA 358 cited with authority in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* (2014) eKLR where the court observed as follows: -

> " ... Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella's case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already ... by authoritative pronouncements in the precedents, they may be conveniently noted in brief as follows:
>
> In an interlocutory injunction application, the Appellants has to satisfy the triple requirements to:
>
> a) establish his case only at a prima facie level
>
> b) demonstrate irreparable injury if a temporary injunction is not granted.
>
> c) allay any doubts as to (b) by showing that the balance of convenience is in his favor."

15. On whether a prima facie case has been established, the court *Mrao Ltd v First American Bank of Kenya and 2 others* (2003) KLR 125 defined prima facie case as follows: -

> " A prima facie case in a Civil Case include but is not confined to a "genuine or arguable" case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

16. The Appellant/Applicant on the one hand stated that by a comprehensive policy of insurance number 04/XP/110xxxx, the 1st Respondent in consideration of the premium paid by the Appellant was required to absolve, indemnify and/or hold indemnified the Appellant from any/all actions, proceedings, procedures, processes, liability, claims, costs, and expenses in relation to, arising out of the use of motor vehicle registration number KBA 433Q. The 2nd Respondent's motor vehicle registration number KBS 667K was hit by the Appellant's motor vehicle. The 2nd Respondent sued the Appellant and judgment was entered in favour of the 2nd Respondent for the sum of Kshs. 699,643 plus costs and interests. That the Appellant had the expectation that the 1st Respondent would fully indemnify and/or absolve the Appellant from the 2nd Respondent's claim for damages and costs. That despite notifying the insurance of the accident and the resultant judgment, the 1st Respondent has refused, declined and/or neglected to pay the decretal sum.

17. The Appellant further stated that they filed an application for injunction dated 6th February 2024 to restrain the 2nd Respondent from alienating, selling, and/or disposing off any of the Appellant's property pending the hearing and determination of the declaratory suit. That the 1st Respondent did not oppose the application, neither did they enter appearance not file a response, and on 13th August 2024, the trial court dismissed the Appellant's application on grounds that the Appellant failed to attach the resultant judgment to the insurance, which the 1st Respondent had allegedly disputed in

its statement of defence filed a day prior to delivery of the ruling and which defence was never served upon the Appellant.

18. The 2nd Respondent on the other hand stated that a valid judgment was entered in the primary suit against the Appellant/Applicant and his driver jointly and severally. That the Appellant was granted 30 days stay of execution but made no attempt to settle the judgment sum and the 2nd Respondent proceeded to execute. That the 2nd Respondent is not privy to the insurance contract which forms the basis of the declaratory suit and the said terms should not be used as a basis to deny her fruits of the judgment. That whereas the Appellant as an insured of the 1st Respondent may well be entitled to seek a declaration that its insurer is liable to settle the claims covered under the insurance policy, that statutory right does not bar the 2nd Respondent as the decree holder.

19. Pursuant to the above, I find that the Appellant/Applicant has demonstrated that they have an arguable case with chances of success. The first test of a prima facie case for grant of temporary injunction has therefore been satisfied.

20. On whether there will be irreparable injury in case temporary injunction is not granted, the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen and 2 Others* (2014) eKLR proclaimed that: -

> " ... the court must further be satisfied that the injury the Respondent will suffer in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying no interlocutory order of injunction should normally be granted however strong the Applicant's claim may appear at that stage."

21. The Appellant stated that the 2nd Respondent commenced the process of execution against them and were served with warrants of attachment and a proclamation notice dated 26th August 2024 which gave the Appellant 7 days to settle the decretal sum. That the proclaimed items included motor vehicle registration numbers KCH 768B, KCC 260G, KBU 467Q, KBS 463P, KBQ790M, KBY 351Y, ZF 1084, ZE 2706, ZF 6111, ZE 8435, assorted office chairs, assorted office tables, printer/photocopier, and any other attachable goods. That if the proclaimed property is sold, the Appellant will suffer grave and irreversible loss of losing its only source of income and all its tools of trade. The Appellant has therefore fulfilled the second condition for grant of temporary injunction.

22. On whose favour the balance of convenience tilts, the court in *Paul Gitonga Wanjau v Gathuthis Tea Factor Company Ltd & 2 Others* (2016) eKLR expressed itself as follows: -

> " Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which the Applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance of convenience lies."

23. The Appellant submitted that if the application is not allowed, the 1st Respondent will be unjustifiably allowed to avoid his obligation under the policy of insurance. That the Appellant will not only suffer

an injustice but this appeal will be rendered nugatory. That the 2nd Respondent will not be prejudiced as the suit from which the appeal emanates is for her benefit. I therefore find that the balance of convenience tilts in favour of the Appellant/Applicant.

24. The upshot is that the Appellant/Applicant has met the threshold for grant of temporary injunction. The Notice of Motion application dated August 28, 2024 is merited and is allowed. Costs be in the cause.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF JANUARY, 2025

.....

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Appellant

..... Advocate for the 1st Respondent

..... Advocate for the 2nd Respondent

Court Assistant – Shitemi