



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 20 OF 2017

(Coram: Odunga, J)

DOLLK LIMITED.....PLAINTIFF

VERSUS

INVESCO ASSURANCE COMPANY LIMITED.....DEFENDANT

AND

JAMES MUTHIANI ISEU.....1ST INTERESTED PARTY

FRANSISCA MUTEI KYALO.....2ND INTERESTED PARTY

MICHAEL ISEU KYALO.....3RD INTERESTED PARTY

JACKLINE NDUNGE MUSYIMI.....4TH INTERESTED PARTY

BERNARD KYALO ISEU.....5TH INTERESTED PARTY

RULING

1. By a plaint dated 20th September, 2017, the Plaintiff herein has sued the Defendant seeking a declaration that the Defendant, the Plaintiff's insured, is bound by law to settle the decrees obtained against the Plaintiff in Machakos Chief Magistrate's Court Case Nos 415, 416, 417, 418 and 418 all of 2016 as well as other matters in which the Plaintiff may have been sued, arising out of the same cause of action. The Plaintiff also sought stay of execution of the said decrees.

2. The substance of the Plaintiff's claim is that he had effected a policy of insurance with the defendant covering the liability of his motor vehicle Registration Number KCC 317C as provided under section 4(b) of the *Insurance (Motor Vehicle Third Party Risks) Act*, Cap 405, Laws of Kenya (hereinafter referred to as "the Act"). According to the Plaintiff during the pendency of the said insurance, the said motor vehicle was involved in a road accident wherein several fare paying passengers sustained injuries. Resulting from the said accident were suits whose particulars are mentioned hereinabove in which judgements were entered and decrees issued against the Plaintiff.

3. It was the Plaintiff's case that pursuant to section 10(1) of the said Act, the said judgements and decrees ought to have been settled by the defendant. However the decree holders in the said suits have opted to realise the suits of their judgements by executing against the Plaintiff.

4. Together with the said plaint, the plaintiff filed an application dated 20th September, 2017 which was amended on 6th October, 2017 in which it seeks an order staying the execution of the judgements in the said cases pending the hearing and determination of this suit. It is that application that is the subject of this ruling.

5. It was averred that following the filing of the aforesaid suits, the Defendant instructed a firm of advocates which appeared therein and defended the said suits on behalf of the Plaintiff. However following the entry of the said judgements, the defendant has adamantly ignored and/or refused to settle the same.

6. It was the Plaintiff's case that it would be highly prejudiced if the orders sought herein are not granted.

7. The application was however opposed by the Interested Parties in whose favour the decrees were issued. According to them, they are not parties to the dispute between the plaintiff and the defendant insurance company as the interested parties are not parties to the contract between the plaintiff and the defendant. In their view the import of this suit is that the Plaintiff is seeking indemnity from the defendant under the doctrine of subrogation. It was however their case that since the defendant was not a party in the case they filed against the plaintiff, the defendant should not be dragged into those proceedings.

8. The interested parties were of the view that this case is a conspiracy between the plaintiff and the defendant to obtain stay of execution against claims that were never appealed against. It was the interested parties' position that the plaintiff ought to settle the interested parties' respective claims and thereafter seek to be indemnified by its insurers without dragging the interested parties to the issue they are not parties to. The interested parties therefore contended that the issues raised in this application amount to an abuse of the court process.

Determination

9. I have considered the application, the affidavits both in support of and in opposition to the application herein. As stated at the beginning of this ruling the plaintiff is seeking stay of execution of decrees in other suits pending the determination of this suit. The application is however predicated upon section 1A and 1B of the **Civil Procedure Act**, Order 22 of the **Civil Procedure Rules**, section 10(1) of the said Act and all other enabling provisions of the law. Sections 1A and 1B of the Civil Procedure Act provide for the overriding objective of the Civil Procedure Act and states as follows:

1A(1) The overriding objective of this Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act".

(2) The Court shall, in exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims-

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

10. To my mind the overriding objective does not create a cause of action. As was held by **Lord Woolf** in **Swain v. Hillman [2001] 1 All ER 91** at pp 94 and 95:

"It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible....Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."

11. Therefore where there is no cause of action or no real prospect of success in a suit, the overriding objective cannot be invoked to sustain proceedings. Similarly, it cannot be invoked to terminate an otherwise valid claim. In this case nowhere in sections 1A and 1B of the **Civil Procedure Act**, is there a power to stay execution in matter that has been heard and determined pending the determination of a new suit.

12. As regards Order 22 of the **Civil Procedure Rules**, the closest provision is rule 25 thereof which provides as follows:

Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided

13. What this provision means is that A files a suit against B and obtains a judgement therein. However B files a separate suit against A. B is in those circumstances entitled to seek that pending the hearing and determination of the subsequent suit, the execution in the earlier suit be stayed. That is not the scenario in the instant matter. The applicant herein is not seeking judgement against the interested party. It is seeking judgement against its insurer, the Defendant. There is no judgement which the insurer has obtained against the applicant which is sought to be stayed in these proceedings. It follows that the said provision is inapplicable.

14. As regards section 10(1) of the *Insurance (Motor Vehicle Third Party Risks) Act* it is clear that the section does not provide for stay of execution. The said section provides that:

If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

15. I however disagree with the interested parties that this is not a suit for subrogation. Subrogation applies in situations where, by virtue of being an insurer, the insurance company is entitled to be placed in the position of the insured and to succeed to all their rights and remedies against third parties in respect to the subject matter of insurance. See *General Principles of Insurance Law* by E R Hardy Ivamy at page 415. Therefore in the earlier suits, the Defendant Insurance Company by defending the Plaintiff herein, the insured, stepped into shoes of the insured under subrogation. See *Kenya Bus Services vs. Susan Muteti Civil Appeal No. 15 of 1992 [1995-1998] 1 EA 103*. However as was held in *Opiss vs. Lion of Kenya Insurance Company Civil Appeal No. 185 of 1991*:

“the right to subrogate does not create a privity of contract between the insurance company and the third party; it only gives the insurance company the right to take over the rights and privileges of the insured and therefore must be brought in the name of the insured.”

16. It was therefore held in *Egypt Air Corporation vs. Suffish International Food Processors (U) Ltd and Another [1999] 1 EA 69* that:

“The whole basis of subrogation doctrine is founded on a binding and operative contract of indemnity and it derives its life from the original contract of indemnity and gains its operative force from payment under that contract; the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity. If there is no contract of indemnity then there is no juristic scope for the operation of the principle of subrogation.”

17. It was however held in *Indemnity Insurance Co. of North America and Another vs. Kenya Airfreight Handling Ltd and Another [2004] 1 EA 52* that:

“Under insurance law principles, for an insurer to be subrogated to the rights of the insured, the latter must have been indemnified by the former; only then can the insurer step into the shoes of the insured.”

18. It follows that this suit does not meet the test of a subrogation suit. However, whereas an insured may well be entitled to seek a declaration that its insurer is entitled to settle the claims covered under the insurance policy, that statutory right of action does not bar a person who is injured from executing the decree issued in its favour against the insured directly.

19. It follows that the instant application is unmerited. Consequently, the same is dismissed.

20. As regards costs, although this Court directed the parties to furnish it with soft copies of the pleadings and submissions in word format, none of the parties complied. Section 1A(3) of the *Civil Procedure Act* provides as hereunder:

A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

21. One of the overriding objectives of the *Civil Procedure Act* is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. Accordingly, there will be no order as to the costs of this application.

22. Orders accordingly.

Read, signed and delivered in open Court at Machakos this 11th day of October, 2018.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr J N Kimeu for the Plaintiff

Mr Chenge for Miss Gichuki for the Interested Parties

