



REPUBLIC OF KENYA



KENYA LAW
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**Mwachia v Kamau (Civil Appeal E570 of 2021)
[2022] KEHC 14980 (KLR) (Civ) (4 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 14980 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E570 OF 2021

CW MEOLI, J

NOVEMBER 4, 2022

BETWEEN

THOMAS MONGARE MWACHIA APPLICANT

AND

PAUL MWANGI KAMAU RESPONDENT

RULING

1. The motion dated 30.09.2021 purportedly filed by Thomas Mongare Mwachia (hereafter the Applicant) seeks to stay execution of the judgment delivered in Nairobi Milimani CMCC No. 3344 of 2019 pending hearing and determination of the appeal. The motion is expressed to be brought under Order 42 Rules 6 of the Civil Procedure Rules, inter alia, on grounds on the face of the motion and amplified in the supporting affidavit sworn by Lillian Munyiri, who describes herself as the legal officer of Geminia Insurance Co. Ltd, the insurer of the Applicant, conversant with the facts of this matter and therefore competent to swear the affidavit.
2. To the effect that being aggrieved and dissatisfied with the whole judgment of the lower court delivered on 13.08.2021 the Applicant has preferred an appeal and is apprehensive that Paul Mwangi Kamau (hereafter the Respondent) is likely to commence the execution process and has also evinced the intention to file a declaratory suit against the Applicant's insurer. She deposes that the Applicant has an arguable appeal with a high chance of success and hence it is in the interest of justice that the instant motion is allowed to avert what is described as irreparable harm to the Applicant. The deponent further expresses willingness to provide security by depositing half of the decretal sum into court or a joint interest earning account.
3. The Respondent opposes the motion through a replying affidavit. The Respondent views the motion as an abuse of the court process, a non-starter and whose sole purpose is to prevent the Respondent from enjoying the fruits of his judgment. It is further deposed that the affidavit in support of the



motion has been sworn by a stranger to the proceedings and hence the motion is incompetent. He goes on to assert that the Applicant has not demonstrated substantial loss and that the lodgment of an appeal does not automatically stay execution of the judgment appealed from. The Respondent contends that the Applicant has approached the court with unclean hands in seeking an equitable relief before this court after failing to utilize the stay of execution order granted before the lower court. He urges the court to dismiss the motion and if inclined to allow the same, to impose a condition for provision of security for due performance of the decree.

4. In response, the Applicant swore his own affidavit dated 17.01.2022 in which he asserted that his motor vehicle was insured by Geminia Insurance Co. Ltd who were involved in the matter under the doctrine of subrogation and hence equally aggrieved by the judgment of the lower court. He reiterated Lillian Munyiri's affidavit material and asserted that it would be extremely difficult to recover the decretal sum to the Respondent whose means are unknown which event would render the appeal nugatory. He also deposes that the motion was filed expeditiously and that he and the insurer have the means to settle the decretal sum and the Respondent will not be prejudiced by an order of stay of execution. He pointed out that the Respondent has not demonstrated his means or ability to refund the decretal sum upon a successful appeal hence in the interest of justice his the motion ought to be allowed.
5. The motion was canvassed by way of written submissions. As regards the applicable principles, the counsel for the Applicant anchored his submissions on the provisions of Order 42 Rule 6 of the Civil Procedure Rules. Counsel first expressed the Applicant's willingness to comply with any conditions on security as may be ordered by the court for due performance of the decree. While calling to aid the decisions in Butt V Rent Restriction Tribunal [1982] KLR 417, HGE v SM [2020] eKLR and RWW v EKW [2019] eKLR he urged the court to exercise its discretion in favour of the Applicant in order to secure the appeal and reiterated that the Respondent will not be prejudiced by the grant of the stay order.
6. On behalf of the Respondent, counsel similarly citing the applicable principles under the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules submitted that the relief sought herein is discretionary and the discretion must be exercised judicially, that is, upon defined principles of law and not capriciously or whimsically. On the issue of substantial loss, he relied on the decision in Civil Appeal No. E121 of 2021 Shoko Molu Beka & Another v Augustine Gwaro Mokamba to argue that substantial loss is a matter of fact to be deposed in the supporting affidavit and in this instance, the Applicant has failed to place before the court evidential material on the basis of which substantial loss could be inferred. Concerning provision of security counsel cited the decision in Edward Kamau & Another v Hannah Mukui Gichuki Misc. 78 of 2015 to assert that the Respondent is entitled to equal treatment before the law and the court should order the Applicant to furnish security by way of balancing the rights of the parties as the Respondent has a lawful judgment in his favour.
7. The court has considered the material canvassed in respect of the motion. As a preliminary issue, the court must determine whether the motion before it is competent. By his replying affidavit, the Respondent raised an objection that the motion was supported by an affidavit sworn by a stranger to the proceedings.
8. The motion before this court was filed on 30.09.2021 and supported by the affidavit of Lillian Munyiri. The Respondent on his part filed his response on 23.10.2021 after which the parties appeared before the court on 27.10.2021 for directions. Counsel appearing for the Applicant sought leave to file a further affidavit, which was granted. Subsequently, in an attempt to rebut the objection raised by the



Respondent, and to further support the motion, the Applicant resorted to depose the further affidavit dated 17.01.2022. Order 51 Rule 4 of the Civil Procedure Rules provides that;-

“Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served.”

9. Order 51 Rule 14 (3) on the same (CPR) states;-

“(3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit.”

10. What is expected is that a motion presented before the court and that is grounded on evidence will be accompanied by a supporting affidavit that is compliant with Order 19 of the Civil Procedure Rules and the Oaths and Statutory Declarations Act. The applicant bringing such motion upon being served with either a response or grounds of opposition to the motion, can with leave of the court to file a supplementary affidavit or further affidavit as he deems fit. This court concurs with the observation made by Odero J. in Astute Africa Investments & Holding v Spire Bank Kenya Limited & Another [2018] eKLR, to the effect that:-

“The general purpose of a Supplementary Affidavit is to allow the Plaintiff/Applicant to respond to the 1st Defendant’s Replying Affidavit or in the alternative to buttress and/or clarify the averments in the Supporting Affidavit. The Plaintiff/Applicant cannot use its Supplementary Affidavit as a means to introduce new facts or raise issues that were not at the core of the suit or the application.”

11. In this instance, the motion was supported by the affidavit of Lillian Munyiri and not the Applicant and as rightly stated by Odero J, the purpose and intent of a supplementary affidavit or further affidavit, is to respond to the issues raised in response and or clarify issues with respect to the affidavit in support. Thus, ideally the supplementary and or further affidavit ought to be sworn by the deponent to the affidavit in support of the motion and not a different party as happened here.

12. Moreover, in a bid to tidy over the objection by the Respondent, the Applicant has through his further affidavit not only sought to present his further affidavit as a supporting affidavit to the motion but also as a cure to the anomaly in the affidavit of Lillian Munyiri to which the Respondent has taken objection. In my view, this is unacceptable; the Applicant could have, but did not deem it necessary to swear his own affidavit to accompany the motion at inception. After all, he is the rightful party to do so and his belated and surreptitious attempt to rectify the unexplained failure is both mischievous and an attempt to steal a march on the Respondent. Under Order 19 Rule 6 of the CPR, the court is empowered to strike out suo motu any affidavit matter which is scandalous, irrelevant or oppressive. Consequently, the further affidavit by the Applicant must suffer the fate of being struck out. It is so ordered. This brings me back to the Respondent’s objection to the supporting affidavit.

13. The deponent to the affidavit in support of the motion deposes in the first paragraph that:-

“That I am the legal officer of Geminia Insurance Company, the insured of the Appellant, I am conversant with the facts of this case having been briefed by the Appellant and therefore competent to swear this affidavit.”



14. Evidently, the insurer appears here to be invoking the doctrine of subrogation as admitted in the further affidavit, and is therefore purporting to litigate on behalf of the Applicant. The question arising from these facts is whether the insurer's rights under the doctrine of subrogation have crystallized in this instance? The answer is in the negative, as undeniably, the insurance company has not settled the Respondents' claim against its insured, the Applicant herein, and in whose behalf the insurance company purports to approach the Court. In *Africa Merchant Assurance Company v Kenya Power & Lighting Company Limited* (2018) eKLR the Court of Appeal had this to say: -
26. The essence of the doctrine of subrogation is not in contention. It allows an insurer after compensating an insured for any loss under the insurance contract to step into the shoes of the insured. In that, the insurer is entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated....
28. As it stands, the law in that respect is settled, that is, that an insurer cannot under the doctrine of subrogation institute a suit in its own name against a third party. See this Court's decisions in *Octagon Private investigation Security Services vs. Lion of Kenya Insurance Co.* [1994] eKLR and *Michael Hubert Kloss & another vs. David Seroney & 5 others* [2009] eKLR.”
15. In the case of *Egypt Air Corporation vs. Suffish International Food Processors (U) Ltd and Another* [1999] 1 EA 69 the Court defined the basis of the doctrine of subrogation as follows:-
- “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.” (Emphasis added)
16. The Court stated in *Opiss vs. Lion of Kenya Insurance Company* Civil Appeal No. 185 of 1991:
- “The right to subrogation 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.”
17. As earlier noted, in this case the insurance company is yet to make good the Respondent's claim but has seemingly assumed to step into the shoes of their insured by depositing the affidavit in support of the motion. The invocation of the doctrine of subrogation by the insurance company is therefore premature, their rights thereunder not having crystallized. This Court agrees therefore with the sentiments expressed by Githua J. while dealing with a similar situation in *Kenya Power & Lighting Company Limited v Julius Wambale & Another* (2019) eKLR, to the effect that:
- “The parameters within which the principle of subrogation applies are now well settled. The doctrine applies where there is a contract of insurance and following crystallization of the risk insured, the insurer had compensated its insured for financial loss occasioned thereby usually by a third party. Under this doctrine, the insurer is in law entitled to step into the shoes of the insured and enjoy all the rights, privileges and remedies accruing to the insured including the right to seek indemnity from a third party. The action must however



be instituted in the name of the insured with his consent and must relate to the subject of the contract of insurance....

It is not disputed that the insurance company has not yet settled the decretal amount on behalf of the applicant who is its insured. It therefore follows that its right under the doctrine of subrogation has not yet crystallized and even if it had, its recourse would only lie in the filing of a suit against the third party blamed for the occurrence of the risk in question for recovery of the sums expended on its insured”

18. Geminia Insurance Company in whose behalf the affidavit supporting the motion, and I dare say the motion itself, appear to have been presented by a stranger to this matter. Ditto for the deponent to the supporting affidavit, Lillian Munyi. The supporting affidavit must be struck out together with the incompetent motion founded upon a premature invocation of the principle of subrogation. The costs of the motion are awarded to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4TH DAY OF NOVEMBER 2022.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Karoki

For the Respondent: N/A

C/A: Carol

