



Mutua v Invesco Assurance Company Limited; Gitonga (Interested Party) (Suing as the Legal Representative of the Estate of Eustace Mwiti Kaburu (Deceased)) (Civil Appeal E022 of 2024) [2024] KEHC 10739 (KLR) (29 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E022 OF 2024
LW GITARI, J
AUGUST 29, 2024**

BETWEEN

MARGARET TIRINDI MUTUA APPELLANT

AND

INVESCO ASSURANCE COMPANY LIMITED RESPONDENT

AND

KABURU GITONGA INTERESTED PARTY

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF EUSTACE
MWITI KABURU (DECEASED)**

RULING

1. What is pending before me is the ruling in an application dated 5/6/2024 filed by the appellant Margaret Tirindi Mutua who is seeking orders that the court be pleased to order the stay of the execution of the Judgment and decree in Chuka Chief Magistrate's Court Civil Case No. E073/2022 pending the hearing and determination of this application and the appeal.
2. It is based on the grounds that the applicant is the owner of the motor vehicle registration number KCL 515 U for which she had taken an insurance cover with the respondent Invesco Insurance Company Limited. The said motor vehicle was involved in a road traffic accident and the deceased (Interested Party) sustained fatal injuries. A suit for the benefit of the estate of the deceased was filed in the Chief Magistrate's Court at Chuka by the Legal Representative of the Estate of the deceased.

The court awarded general damages of Ksh.2,312,925 and interest of Ksh.108,739/- totaling to Ksh.2,421,664/-. The insurance has now failed and or refused to settle the decretal sum in Chuka C.M.CC No. E073/2022. That the Interested Party has commenced execution of the said Judgment and has served her with proclamation/attachment notice by auctioneers. That the defendant is bound



to settle the said decree in Chuka Chief Magistrate's Court Civil Case No.E073/2022 by dint of Section 10 of the Insurance (Motor Vehicle Third Party Risks) (Cap 405 Laws of Kenya.)

3. The respondent has not opposed the application. However the interested Party has urged the court to find that the Interested Party will be prejudiced as the appeal is not against the Judgment but is against an application that was dismissed. The Interested Party further submits that the Judgment was entered in July 2023 and there has been no appeal but the applicant is going round that application. The Interested Party has urged the court to dismiss the application. In response the applicant submits that the stay orders are against the judgment and the decree and not the ruling. That they want to oppose the Judgment.

Analysis and determination:

4. I have considered the application. The issue that arises for determination is whether the court should order stay of execution of an application that was dismissed.

I have considered the application. The applicant seeks stay of execution. Order 42 Rule 6 of the Civil Procedure Rules provides for the requirements in applications for Stay of Execution. The rule provides that no order for stay of execution shall be made unless the court is satisfied that substantial loss may result to the applicant and that the application has been made without unreasonable delay and such security as the court may order for the due performance of such decree as the court may ultimately order.

Order 42 rule 6 Civil Procedure Rules provides as follows:

6. No appeal or second appeal shall operate as a stay of execution or proceedings
(1) under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
(2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss 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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.



- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (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.”

The rules are meant to ensure that none of the parties is prejudice and that parties fight it out in court on a level playing ground. The applicant is supposed to ensure that he has sufficient cause for seeking he orders and that he/she is likely to suffer substantial loss and that he was willing to furnish security. In this case the applicant is insisting that the appeal is against the Judgment. This is far from the truth as the memorandum of appeal states that the appeal is against the Ruling of the Honourable Court delivered on 11/6/2024 in the Chief Magistrate’s Court at Chuka CMCC E059/2024 between the appellant and the respondent. The ruling is annexed. The Judgment in the proceedings pertaining to this matter was entered in July 2023 and there is no leave to appeal against the Judgment out of time. The applicant is misleading the court and has therefore not coming to court in clean hands as the appeal is not against the Judgment. The appellant has not demonstrated that she is likely to suffer substantial loss. The Judgment which was entered against the applicant is for a liquidated sum. In Kenya Shell Limited –v- Kibiru (1986) KLR 410 it was stated that;

Substantial loss in its various form is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondent should be kept out of their money. It is not sufficient by merely stating that the sums of 20,380/- is a lot of money and the applicant would suffer loss if money is paid..... the applicant should show the damages it would suffer. On the other hand granting the stay would be denying a successful litigant of the fruits of his Judgment.”

In this case, the Judgment was for liquidated sum of Kshs.2,421,664/-. The respondent who was represented in court when this matter proceeded submitted that they were trying to come up with amicable settlement. In view of that statement the respondent is willing to settle the matter with the applicant and therefore she is not likely to suffer substantial loss. In any case a substantial loss is one that a party may not be compensated by an award of damages. This is not the case as the Judgment is for a liquidated sum.

The applicant has not offered security. It is trite that no order of stay of execution may be issued unless security for the due performance of the decree has been provided. The applicant has not provided a security nor has she deponed that she is willing to provide security.

I find that the application has not met the threshold for the granting of stay of execution. The applicant is riding on an appeal against Judgment whereas in actual fact the appeal is against the ruling delivered in the Chief Magistrate’s Court. There is no appeal against the Judgment and therefore this court has no basis of granting orders of stay of the judgment. The application is without merits and is dismissed with costs to the Interested Party.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH DAY OF AUGUST 2024.

L.W. GITARI

JUDGE

29/8/2024



Mr. Muthomi for Interested Party

Ms Maina for Applicant

The ruling has been read out in open court.

L.W. GITARI

JUDGE

29/8/2024

