



REPUBLIC OF KENYA



**Barmasai v Ochung (Miscellaneous Civil Application E174 of 2024)  
[2024] KEHC 9969 (KLR) (9 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 9969 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
MISCELLANEOUS CIVIL APPLICATION E174 OF 2024  
RN NYAKUNDI, J  
AUGUST 9, 2024**

**BETWEEN**

**BENARD BARMASAI ..... APPLICANT**

**AND**

**SAMUEL OMOLO OCHUNG ..... RESPONDENT**

**RULING**

1. Before for determination is a notice of motion of application dated 10<sup>th</sup> June, 2024 for determination. The applicant seeks reliefs to wit;
  - a. Spent
  - b. That leave be granted to the firm of M/s Isiaho Sawe & Co. Advocates to come on record for the Applicant in place of M/s Lusinde Khayo & Co. Advocates.
  - c. That pending the hearing and determination of this application inter-parties, there be stay of execution of the decree issued in Eldoret Civil Case No. E521 of 2003 and/or all its consequential orders.
  - d. That pending the hearing and determination of Eldoret Chief magistrate's Court Civil Case No. E349 of 2024, there be stay of execution of the decree issued in Eldoret Civil Case No. E521 of 2003.
  - e. That his court be pleased to issue any such further orders/directions in the circumstances in order to safeguard justice.
2. In support of the application are sixteen substantive grounds and the affidavit of Benard Barmasai. The applicant avers that:
  - i. The applicant is the legal owner of Motor Vehicle Registration No. KAJ 614F, Subaru Salon.



- ii. That the aforesaid vehicle was involved in a road traffic accident in which the Respondent herein sustained bodily injuries.
  - iii. That the Respondent instituted Eldoret Civil Case No. E521 of 2003 seeking inter alia general damages for the injuries suffered.
  - iv. The above suit proceeded ex-parte and judgment entered in favor of the Respondent as against the applicant and one Elyvas Situma Wanjala in the sum of Kshs. 2,078,374/= inclusive of costs and interest.
  - v. That the Respondent has commenced execution hence placing the applicant at risk of either being committed to civil jail for failure to satisfy the decree in force and/or have his property sold by public auction.
  - vi. The accident forming the substratum of Eldoret Civil Case No. E521 of 2003 occurred during the period covered by the Applicant's insurance policy.
  - vii. That having insured his vehicle in issue as aforesaid, the Applicant is thus legally indemnified from satisfying the decree in force.
  - viii. That the applicant has already filed a declaratory suit against his insurer vide Eldoret Chief magistrate's Court Civil Cases No. E349 of 2024 which suit is pending hearing and determination.
  - ix. That the indemnity provided under Section 4(1) and 5(b) of CAP 405 of the Laws of Kenya is what forms the gist of the pending declaratory suit hence rendering appropriate orders necessary.
  - x. That in the foregoing, if stay of execution is not granted as prayed, the pending declaratory proceedings will be rendered a nugatory.
  - xi. That there is a likelihood of the declaratory suit being determined in favor of the Applicant hence rendering stay orders necessary in the best interest of justice.
  - xii. That the applicant has a meritorious claim against his insurer with very high chances of success.
  - xiii. That the applicant may either be committed to civil jail and/or have his properties sold by public auction yet he is legally indemnified from satisfying the decretal sum awarded by the trial court.
  - xiv. That the applicant is ready and willing to deposit Kshs. 400,000/= in a joint account in the name of counsels as a gesture of good faith until the declaratory suit is heard and concluded.
  - xv. That justice, fairness, equity and balance of convenience tilts towards granting of the orders sought.
  - xvi. That no prejudice shall be suffered by the Respondent who will have her day in court in the declaratory suit if she so wishes to be enjoined.
3. In response to the application, the Respondent filed grounds of objection dated 19<sup>th</sup> June 2024. The Respondent is opposed to the application for reasons:
- a. The application is bad in law and does not disclose any reasonable grounds for the grant of the orders sought.
  - b. The application is *res judicata*.



- c. There are no pleadings on which the application is based.
  - d. That the applicant should pay the decretal sum and thereafter claim indemnity from the Insurance Company.
4. Both parties filed written submissions in agitation of their positions regarding the instant application. For the applicant, it is of significance that the subject motor vehicle was insured by the applicant vide policy number 30190071 issued by his insurer, Kenya Orient Insurance Company.
  5. It is the applicant's case that having paid the requisite premiums for his subject motor vehicle to his insurer, he is legally indemnified under sections 5(o) and 10(1) of Cap 405 of the Laws of Kenya from satisfying any decree covered by the policy. On this, the applicant cited the decision in *Thomas Muoka Muthoka & Another v Insurance Company of East Africa Limited* (2008) eKLR.
  6. The Applicant in urging the court to issue stay orders submitted that there is no dispute that the applicant instituted an action against his insurer, Kenya Orient Insurance Company Limited vide Eldoret CMCC No. E349 of 2024.
  7. The Respondent on the other hand submitted that the orders sought by the applicant cannot issue for reasons that they are substantive orders sought in a miscellaneous application.
  8. According to the Respondent an application was made in Eldoret High Court Civil Appeal Number 13 of 2021. That the application was found to lack merit and was dismissed by the Honorable justice Stephen Githinji on 21<sup>st</sup> of September, 2021 and the appeal was dismissed. He also argued that there is no privity of contract between the Respondent and the applicant's insurer. The respondent cannot therefore be dragged into a contract that he is not party to.
  9. On the said basis, the Respondent submitted that there is no basis upon which the court can grant the orders being sought by the applicant.

### **Analysis and Determination**

10. I have carefully read through the application and the only issue I find for determination is whether the applicant has met the prerequisite for grant of stay of execution.
11. The Respondent obtained an ex-parte judgment against the applicant and according to the applicant, the Respondent has commenced the process of execution. The applicant also averred that he has instituted a declaratory suit seeking inter alia to be indemnified against satisfying the decree in force.
12. The facts of this notice of motion and the orders sought on the face of it appear to be underpinned under Order 42 Rule 6(1) of the *Civil Procedure Rules* which governs stay of execution or proceedings arising out of the decree of the trial court pending an appeal. It is worth noting that the applicant has not preferred an appeal against the order or decree of the trial court but has elected to file a declaratory suit against the insurer. That means that the insurance company with whom he had entered a contract of insuring the risk has defaulted in meeting the decretal sum arising out of the judgment in Eldoret CMCC E521 of 2003.
13. The provisions of Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* outline the duty of an insurer to settle a decretal amount as follows: -
  10. Duty of insurer to satisfy judgments against persons insured
    - (1) 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.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in Section 5 (b) prescribed in respect thereof in the Schedule.

14. Upon entry of judgment in such accident claims where the Defendant was insured, the above provisions require the insurer to settle the decretal amount as awarded and in accordance with the policy of insurance issued to the applicant. It is however not always the case that the insurers willingly settle the claim and this necessitates the filing of a declaratory suit to compel the insurer to settle the decree.
15. In the cases of *Dolk Limited v Invesco Assurance Company Limited & 5 Others* [2018] eKLR and *Mutburi Ntara & Another v Francis Mworira Igweta* [2016] eKLR the court in both instances stated that despite the fact that section 10 (1) of the *Insurance (Motor Vehicle Third Party Risks) Act* providing for the mandatory satisfaction of a judgement of any sum payable to its insured under a policy, the section does not provide for a stay of execution against the insured by the third party and further that the statutory right to seek a declaration against the insurer by the insured does not and cannot bar a decree holder from executing his/her decree against the judgement debtor who is the insured.
16. Generally speaking, the guiding principles on stay of proceedings applied for by any of the applicants to the claim, must satisfy the principles in *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* (2014) eKLR and *Global Tours & Travels Limited*; Nairobi HC Winding up cause No. 43 of 2000.
17. In this respect, *Halsbury Law of England 4<sup>th</sup> Edition vol. 37 page 330 and 332*, put it more succinctly as follows:

“The stay of proceedings is a serious, grave and fundamental interruption to the rights of a party that has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings is beyond or reasonable doubt ought not be allowed to continue.”
18. In considering whether this court on reflection of the certificate of urgency and the corresponding notice of motion dated 10<sup>th</sup> June, 2024 has the jurisdiction to grant the orders pleaded by the applicant, it emerges that the same has not been invoked by the applicant within the confines of the *Constitution* of statute law. The genesis of the cause of action has between the applicant and the respondent is well captured from the judgment of the trial court dated 28<sup>th</sup> May, 2019. The record also further reveals that on 30<sup>th</sup> April, 2024 the Respondent moved the court and extracted a warrants of arrest in execution of the decree arising out of the aforesaid judgment in the sum of Kshs. 2,078,374=. This decision of the lower court as far as the record is concerned was never appealed as provided for under Section 78 & 79(g) of the *Civil Procedure Act*. That means Prima facie, there is no appeal before this court. The second facet in which this court can exercise jurisdiction, is on review of an impugned order of the court below by an aggrieved party. I also note from the record that there is no evidence that the applicant is



dissatisfied with the decision of the trial court and for one reason or another, he seeks to have it reviewed by a superior court within the lens of Art. 165(6) & (7) of the Constitution.

19. As a matter of emphasis arising out of the certificate of urgency and the Notice of Motion, the issue of jurisdiction is pertinent as stated in Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others, Civil Application No. 2 of 2011 as follows:

“A court’s jurisdiction flows from either the constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

20. There is no appeal or review from any judgment, order or decision of the subordinate court in the exercise of this court’s jurisdiction as expressly stated in the Constitution and the Civil Procedure Act and Rules. Essentially, jurisdiction means and includes any authority or powers conferred by the law upon this court to decide or adjudicate any dispute between the parties or pass judgment or order. Therefore, jurisdiction is the key question for the applicant to have his matter admitted for hearing and determination. Strangely enough, there is no declaratory suit filed or initiated before the high court as between the applicant and the respondent. The suit which is of a civil nature has evidenced from the record is pending before the Chief Magistrates Court in Civil Case No. E349 of 2024. The primary jurisdiction doctrine bars this court to grant any reliefs sought in the notice of motion dated 20<sup>th</sup> June, 2024. The Court of competent jurisdiction, is the session magistrate at the Chief Magistrates Court.
21. It is my view therefore the applicant’s effort to bring the ripeness doctrine under the umbrella of the case or controversy filed in the Chief Magistrates Court E349 of 2024, is unfortunate. The subject matter being canvassed was not ripe as at that stage, the litigation by the applicant and the respondent is already pending hearing and determination on the merits before that forum as constituted in Art. 50(1) of the Constitution. It is now well settled a principle of law, that mere filing of a suit or an interlocutory application would not ripen the jurisdiction of the court. If I understand the application before me very well as initiated by the applicant, I take the broader question in holding that the applicant is guilty of not exhausting the jurisdiction of the Magistrates Court before inviting an appeals court to render itself on the subject matter. What is more, a party is bound by law to fulfill a jurisdictional exhaustion requirement and apply it faithfully so as not to allow injustice or create multiplicity of suits at different forums on the same subject matter. The steps necessary to exhaust all remedies are specific to the statutory scheme in the civil administration of justice.
22. For the above reasons, I have reached one main conclusion that the application is voidable to save it from a doctrinal and conceptual quagmire on jurisdiction with costs to the Respondent.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 9<sup>TH</sup> DAY OF AUGUST 2024**

.....

**R. NYAKUNDI**

**JUDGE**

