



REPUBLIC OF KENYA



**AIG Kenya Insurance Co. Ltd v Muga & 17 others (Civil Suit E025 of 2021)  
[2023] KEHC 1134 (KLR) (Civ) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1134 (KLR)

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

**CIVIL  
CIVIL SUIT E025 OF 2021**

**CW MEOLI, J**

**FEBRUARY 16, 2023**

**BETWEEN**

**AIG KENYA INSURANCE CO. LTD ..... APPLICANT**

**AND**

**KELLY MUGA ..... 1<sup>ST</sup> RESPONDENT**  
**DISTRIBUTED COLOUR SYSTEMS ..... 2<sup>ND</sup> RESPONDENT**  
**BRAND SOLUTIONS ..... 3<sup>RD</sup> RESPONDENT**  
**BRENDA ACHIENG MUGA ..... 4<sup>TH</sup> RESPONDENT**  
**YUNAMI INTERIORS ..... 5<sup>TH</sup> RESPONDENT**  
**HARRIET MOINDI MAGOMA ..... 6<sup>TH</sup> RESPONDENT**  
**WEBNET SOLUTIONS ..... 7<sup>TH</sup> RESPONDENT**  
**MUSHKIN PRINTING AGENCIES ..... 8<sup>TH</sup> RESPONDENT**  
**SAM MUNDA MUGA ..... 9<sup>TH</sup> RESPONDENT**  
**DANIEL ANGIENDA ..... 10<sup>TH</sup> RESPONDENT**  
**ELIAS OJERA DWALO ..... 11<sup>TH</sup> RESPONDENT**  
**EVANCE ACHIYA ASIYO ..... 12<sup>TH</sup> RESPONDENT**  
**FRANKLINE NYAKUNDI OTOTO ..... 13<sup>TH</sup> RESPONDENT**  
**KENNEDY MWANGI KAGIRI ..... 14<sup>TH</sup> RESPONDENT**  
**PHILIP OUMA OKETCH ..... 15<sup>TH</sup> RESPONDENT**  
**WAMBUGU GACHARA ..... 16<sup>TH</sup> RESPONDENT**



**WILBRODA OTIENO AYUELU ..... 17<sup>TH</sup> RESPONDENT**

**YUNAMI HOLDINGS LIMITED ..... 18<sup>TH</sup> RESPONDENT**

## **RULING**

1. The motion dated April 5, 2022 by AIG Kenya Insurance Co. Ltd (hereafter the Plaintiff/Applicant) inter alia seeks a temporary stay of proceedings in Thika Chief Magistrate's Court Case No 37 of 2020 Kennedy Kagiri Mwangi v AIG Kenya Insurance Co Ltd (hereafter the lower court suit) pending hearing and determination of the suit herein. The motion is expressed to be brought under Section 1A, 1B, 3A & 6 of the *Civil Procedure Act*, Order 40 Rule 1 & 4 and Order 51 Rules 1 of the Civil Procedure Rules, inter alia. It is anchored on grounds on the face thereof, as amplified in the supporting affidavit sworn by Esther Kung'u, who describes herself as the Legal Officer of the Applicant, fully conversant with the matter, competent and duly authorized to swear the affidavit.
2. To the effect that the Applicant's suit herein seeks to recover its monies fraudulently obtained by Kelly Muga, Distributed Colour Systems, Yunami Travel and Tours Brand Solutions, Brenda Achieng Muga, Yunami Interiors, Harriet Moindi Magoma, Webnet Solutions, Mushkin Printing Agencies, Sam Munda Muga, Daniel Angienda, Elias Ojera Dwalo, Evans Achiya Osoyo, Frankline Nyakundi Ototo, Kennedy Mwangi Kagiri, Phillip Ouma Oketch, Wambugu Gachara, Wilbroda Otieno Ayuelu and Yunami Holdings Limited (hereafter the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup> & 18<sup>th</sup> Defendant(s)/Respondent(s), respectively ) herein. That among the reliefs sought is tracing and recovery of monies obtained by fraud from the Applicant's accounts and utilized in the acquisition of various properties acquired by the Respondents. She deposes that one of the properties that are the subject of the suit, and in respect of which the Applicant seeks a determination whether it was obtained through monies fraudulently drawn from the Applicant's accounts by the Respondents is land parcel LR No Juja/Kiaura Block 12/660 (hereafter the suit property); that the same was acquired by the 18<sup>th</sup> Respondent and was registered in its name ; and that on account of the Applicant's interest in the suit property, the Applicant registered a caution with the Land Registrar on June 21, 2019 pending determination of this suit.
3. The deponent further states that the 14<sup>th</sup> Respondent being the applicant in lower court suit claims therein to have acquired the suit property from the 18<sup>th</sup> Respondent and consequently seeks an order to raise the caution lodged by the Applicant in respect of the suit property. And that the Applicant stands to suffer prejudice if the proceedings in the lower court suit proceed to conclusion resulting in the lifting the caution, in which event the 14<sup>th</sup> Respondent may dispose of the suit property. She contends that the Respondents will not suffer any prejudice if the lower court suit is stayed and that the motion is brought in the interest of justice to avoid a multiplicity of suits over the same subject matter and or causing embarrassment to the judicial process.
4. The motion is opposed through a replying affidavit sworn by the 14<sup>th</sup> Respondent. He takes the view that the material raised in support of the motion constitutes a gross distortion on the nature and nexus between the cause of action before this court and the one before the lower court. He contends that the suit before this court relates to fraudulent acquisition of funds allegedly utilized to acquire the suit property among others which action is in no way linked to him. He asserts that there is no connection between the instant suit and lower court suit; that the Applicant can be compensated by monetary damages and that the Applicant has not tendered evidence of prejudice or loss that may be occasioned that cannot be compensated by way of damages. Pointing out that he had already obtained the consent



to transfer the suit property, he deposes that the motion is devoid of merit, misconceived and an abuse of the court process and therefore ought to be dismissed. No other Respondent filed a response to the motion, which was primarily canvassed between the Applicant and the 14<sup>th</sup> Respondent.

5. The motion was canvassed by way of written submissions. Counsel for the Applicant began by reiterating the affidavit material in support of the motion. Submitting on the court's jurisdiction to entertain the instant motion, counsel placed reliance on Section 1A, 1B & 3A of the Civil Procedure Act and the decisions in Britam General Insurance Co. (K) Ltd v Stephen Wambua Masila & 11 Others [2020] eKLR, Martin Kamakya v Resolution Insurance Co. Ltd & Anor [2021] eKLR and Monarch Insurance Co. Ltd v Stephen M. Nzioka & Anor [2022] eKLR. He asserted that the court statute reserves inherent power and jurisdiction of the court for the issuance of orders to stay proceedings.
6. Concerning the merits of the motion, counsel cited Halsbury's Law of England, 4<sup>th</sup> Edition, Vol. 37 page 330 & 322 and the decision in Watu Credit v Geoffrey Mokaya Aboki & Karen Chepkurui [2022] eKLR to submit a high threshold must be met before an order of stay of proceedings is issued. He contended that allowing the motion would be an exercise of judicial discretion. In order to prevent a miscarriage of justice, multiplicity of suits and embarrassing the court through possible issuance of conflicting orders in respect of the same subject matter by courts of different hierarchy. Counsel thus called to aid the decisions in Port Florence Community Health Care v Crown Health Care Limited [2022] eKLR, Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR and Supermarine Handling Services Ltd v Kenya Revenue Authority [2010] eKLR.
7. On behalf of the 14<sup>th</sup> Respondent, counsel equally restated the contents of the affidavit in reply as part of his submissions. Counsel cited Kenya Wildlife Service v James Mutembei [2019] eKLR and Global Tours & Travel Limited v Five Continents Travel Limited [2015] eKLR to submit that stay of proceedings is a grave judicial action which impinges on the rights of a party to conduct litigation, access to justice, and right to fair trial. He asserted that there was no nexus between the suit in the court below and the instant suit and that the Applicant's intention is to deprive the 14<sup>th</sup> Respondent's access to justice. Citing the decision in David Morton Silverstein v Atsango Chesoni [2002] eKLR counsel contended that the grant of an order of stay of proceedings is discretionary and not deserved in this matter where the motion is misconceived and not well-intentioned. He urged the court to dismiss the motion.
8. The court has considered the material canvassed in respect of the motion. There is no express provision in the Civil Procedure Rules that applies directly to the situation before us. However, the court would not be hamstrung and in deserving situations or where the ends of justice so require, the court may invoke its inherent jurisdiction under section 3A of the Civil Procedure Act which provides that:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
9. As to what constitutes inherent jurisdiction of the court, the Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR rendered itself as follows:-

“Also cited was Section 3A of the Civil Procedure Act which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In Equity Bank Ltd versus West Link Mbo Limited [2013], eKLR, Musinga, JA stated inter alia, that, by “inherent power” it means that



“Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.”

The Supreme Court went further in *Board of Governors, Moi High School Kabarak and another versus Malolm Bell* [2013] eKLR, to add the following:-

“Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just.”

10. There are enough authoritative precedents concerning the court’s inherent jurisdiction to stay proceedings in order to meet the ends of justice and or to avert abuse of the court process. Ringera, J (as he then was) in *Re Global Tours & Travel Ltd* Nairobi HCCC No 43 of 2000 (UR) spelt out the applicable considerations in determining an application for stay of proceedings pending appeal that equally apply to the instant matter. He stated:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

11. Thus, as rightly argued by the Applicant the ends of justice and need to avoid unnecessary proliferation of proceedings, which needlessly dissipates the court’s limited time resource, are key considerations in an application of this nature. The Court of Appeal in *Raymond Ruto & 5 Others v Stephen Kibowen* [2021] eKLR exhorted that:-

“We acknowledge at the outset, that a court will sparingly and only in exceptional circumstances will it grant an order to stay of proceedings which essentially is an interruption of the other parties right to conduct their hearing....

“The learned authors of; Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, have also given some principles to bring to bear while considering whether or not a court should stay proceedings as follows: -

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party 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 proceeding beyond all reasonable doubt ought not to be allowed to continue.”

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...”

12. The basis of the application is primarily that land parcel LR No Juja/Kiaura Block 12/660 forms part of the subject matter herein, the Applicant’s pleaded case being that the property was acquired using funds fraudulently drawn from the Applicant’s accounts. And that the Applicant stands to suffer prejudice if the proceedings in Thika CMELC Case No 37 of 2020 were proceed to conclusion, resulting in the lifting of the caution lodged by the Applicant in respect of the said land parcel. Which event would enable the 14<sup>th</sup> Respondent to freely dispose of the suit property before this case can be determined, thereby resulting in a miscarriage of justice and possible issuance of conflicting orders by two different courts over the same subject matter. The 14<sup>th</sup> Respondent has disputed any nexus between the two causes and asserted his right to access to justice.

13. The Applicant avers in paragraph 41 & 45 of the plaint herein that;-

“41. The 14<sup>th</sup> Defendant .....is the 1<sup>st</sup> Defendant’s brother in law and the 4<sup>th</sup> Defendant’s husband. In concert and collusion with the 1<sup>st</sup> Defendant, the 14<sup>th</sup> Defendant knowingly, willingly and expressly sought to facilitate the commission of fraud against the Plaintiff by providing his personal information, information of his business account, and bank details that enabled and allowed the 1<sup>st</sup> Defendant to defraud the Plaintiff by accepting and utilizing fraudulently acquired funds from the Plaintiff, of which fraud they reasonably had notice of the fraud

45. The 18<sup>th</sup> Defendant (Yunami Holdings).....was incorporated solely as a device to be used by the 1<sup>st</sup> Defendant to perpetrate the fraud against the Plaintiff.

Particulars of fraud by the 18<sup>th</sup> Defendant.

(a) ...

(b) ..

(c) ..

(d) ..

(e) That amongst the properties owned by the 18<sup>th</sup> Defendant is a piece of land Juja/Kiaura Block 12 (Nawell/Njemuwa) 660 that was acquired through the fraudulent diversion of funds from the Plaintiff. (sic)

14. The Applicant seeks among other reliefs that;-

“(d) A permanent injunction be and is hereby issued restraining the 18<sup>th</sup> Defendant itself or through its agents from dealing with, transferring, selling, assigning, leasing, charging or in any other way encumbering the property known as Juja/Kiaura Block 12 (Nawell/Njemuwa) 660”

(e) .....



- (f) A mandatory injunction be and is hereby issued compelling the 18<sup>th</sup> Defendant to transfer the property known as Juja/Kiaura Block 12 (Nawell/Njemuwa) 660 to the Plaintiff.
- (g) In the event that the 1<sup>st</sup> and 18<sup>th</sup> Defendant fail to execute the relevant documents to transfer the said properties to the Plaintiff within (60) days of the order of this court, the Deputy Registrar of the High Court be mandated to execute all necessary documents to effect the transfer of the said properties to the Plaintiff...” (sic)
15. Annexure EK-03 to the supporting affidavit is a copy of the plaint in Thika CMELC Case No 37 of 2020 . The 14<sup>th</sup> Respondent and Applicant are therein impleaded as the plaintiff and defendant, respectively. The 14<sup>th</sup> Respondent avers therein at paragraph 3 that;-
- “ 3. At all material times the Plaintiff was the beneficial and equitable owner of Juja/Kiaura Block 12/660 having purchased the property from (DIOS) Yunami Holdings (18<sup>th</sup> Respondent)” (sic)
16. The reliefs sought by the 14<sup>th</sup> Respondent include;-
- “A mandatory injunction compelling the Defendant to remove caution lodged on Juja/ Kiaura Block 12/660 by the Defendant” (sic)
17. Evidently, the two causes rotate around two conflicting claims to the land parcel LR No Juja/Kiaura Block 12/660 that will eventually be determined the conclusion either suit. Claims of a serious nature have been made by the Applicant regarding the bona fides of the title allegedly acquired by the 14<sup>th</sup> Respondent in respect of the suit property. Of course, in the event the lower court suit is determined earlier in favour of the 14<sup>th</sup> Respondent, such finding would have a bearing on the present suit, in addition to freeing the suit property for disposition by the 14<sup>th</sup> Respondent, thereby prejudicing the Applicant’s claim herein before it is adjudicated, a travesty of justice. Not to mention the real possibility of a conflicting order being issued in the present suit upon conclusion. Such an eventuality would be a source of embarrassment to both courts. Hence, there is merit in the Applicant’s argument that granting the instant motion would prevent such scenarios.
18. Although it is true that the value of the suit property can be quantified and compensated by damages, the prejudice likely to be occasioned to the Applicant if the motion is disallowed would be infinitely higher, as the suit property may have changed hands by the time the present suit is concluded. Conversely, the Applicant is merely seeking an order that essentially freezes the status quo in respect of the ownership of the suit property pending determination of this suit. If the suit herein resolves in the favour of the 14<sup>th</sup> Respondent, the property would still be available to him.
19. Besides, the court is mindful of the need for diligent use of court resources, including time, as underscored by Section 1A, 1B & 3A of the *Civil Procedure Act*. As held in *Osho Chemicals Ltd v Tabitha Wanjiru Mwaniki* [2018] eKLR the court bears the duty imposed by Section 1B & 1A of the *Civil Procedure Act*, to further the overriding objective in Section 1 of the *Civil Procedure Act* which states:
- “ 1A(1)the overriding objective of this Act and the rules made hereunder is to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;



- (2) The court shall, in the 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 sub-section (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 process of the court and to comply with the directions and orders of the court.”

20. In the result, the court feels assured and is prepared in the exceptional circumstances of this case, to invoke and exercise its inherent power and discretion in favour of the Applicant by allowing the motion dated April 5, 2022 with costs to the Applicant.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Applicant: Mr. Nkarichia h/b for Mr. Mwangi

For the 14<sup>th</sup> Respondent: N/A

For the 10<sup>th</sup> Respondent: Ms. Kimathi h/b for Mr. Onsare

C/A: Carol

