



REPUBLIC OF KENYA



KENYA LAW

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**Ngunyu v Invesco Assurance Company Limited; Mwangi (Interested Party)
(Civil Case E006 of 2022) [2023] KEHC 3928 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3928 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL CASE E006 OF 2022
GL NZIOKA, J
APRIL 26, 2023**

BETWEEN

FRANCIS GATHUA NGUNYU APPLICANT

AND

INVESCO ASSURANCE COMPANY LIMITED RESPONDENT

AND

REGINA NYAMBURA MWANGI INTERESTED PARTY

RULING

1. By a notice of motion application dated 16th August 2022, brought under the provisions of Article 159 (2) of *the Constitution* of Kenya, sections 3A and 63 (c) and (e) of the *Civil Procedure Act* and Order 51 Rule 1 and Order 22 of the Civil Procedure Rules, the applicant is seeking for the following prayers: -
 - a. Spent
 - b. Spent.
 - c. That, this Honourable court be pleased to order a stay of execution of the judgement and decree of the Senior Principal Magistrates court at Engineer in Civil Suit No. 26 of 2019, Regina Nyambura Mwangi vs Francis Gathua Ngunyu issued on; 17th September 2020, pending the hearing and determination of the suit.
 - d. That this Honourable court be pleased to set aside the warrants of arrest in execution issued on; 21st June 2022 in the execution of the judgement and decree in Engineer Civil Suit 26 of 2019, Regina Nyambura Mwangi vs Francis Gathua Ngunyu issued on 17th September 2020 at Engineer.



- e. Spent.
 - f. The costs of this application be provided for.
2. The application is supported by the grounds thereto and an affidavit of even date sworn by the applicant. He avers that he is the registered owner of motor vehicle registration No. KBQ 742J, which, at all material times was insured by respondent under the policy number 058/0804/1/034176/2016/03 TPO.
 3. That on or about 27th September 2018 the said motor vehicle was involved in a traffic accident causing severe injuries to the interested party whereupon the interested party filed a civil suit No. 26 of 2019, Regina Nyambura Mwangi Vs Francis Gathua Ngunyu, at Engineer Law Courts and the respondent instructed an advocate to come on record on behalf of the applicant.
 4. Subsequently, judgement in the matter was delivered on 17th September 2020 against him in the sum Kshs 158,755 as the principal amount, interest and costs. That it was a legitimate expectation that under the provision of section 10 of chapter 405 of the laws of Kenya, the respondent would settle the decretal sum,
 5. However, despite notifying the respondent of the judgement and the decree no action has been taken by the respondent to settle the same and as a result the total decretal amount plus cost and interest as at 8th June 2021 now stands at Ksh 226,780.
 6. Further, due to the non-payment of the decretal amount the interested party applied for execution and warrants of execution were issued. That unless a stay of execution is granted, he will suffer irreparable damage and the declaratory suit rendered nugatory
 7. However, the application was opposed by the interested party vide a replying affidavit dated 12th October 2022, in which prayed that the application be dismissed for reasons that: -
 - a. That Invesco Assurance Company Limited was placed under Liquidation vide a ruling delivered on 7th November 2019.
 - b. That under section 432 (2) of the *Insolvency Act* No. 18 of 2015, while a company is under Liquidation no person may begin or continue legal proceedings against the company except with the approval of the court.
 - c. That the plaintiff/applicant has not sought nor obtained leave of the court whereof, the Honourable Court lacks the jurisdiction to make any other step(s) in this matter.
 - d. That as such, the application dated 16th August 2022 and indeed the entire suit is fatally defective and ought to be struck out with costs.
 8. The interested party argues that the applicant did not notify the respondent of the judgment entered against him as required and no evidence has been placed before this court to that effect. Further the applicant has not demonstrated irreparable damage he will suffer if the orders sought are not granted.
 9. That, the judgment in the primary suit was delivered on 17th September 2020 but to date the applicant has never satisfied the same. Furthermore, the applicant has not met the criteria for grant of an order of stay of execution as he has failed to demonstrate the irreparable damage and prejudice that he stands to suffer if the orders sought are not granted. That orders sought are granted at the discretion of the court and not as a right.



10. In further disposition, the applicant swore a supplementary affidavit dated 16th November 2022 and averred that there is no final decision placing the respondent under liquidation, as evidenced by a search in the Kenya Law Reports or Google. That, decisions have been rendered on applications against the respondent, as late as December 2021 and April 2022, but, none of the decisions explicitly placed the respondent under liquidation and therefore it was not mandatory to seek leave of the court before making the current application.
11. The applicant reiterated that he will suffer substantial loss, if the stay of execution is not granted as the decretal sum of Kshs. 226,780 is no mean amount and he will be subjected to unnecessary hardship of instituting legal proceedings to recover the decretal sum from the interested party, if the declaratory suit is in his favour. Further, failure to recover the sum would render the application and declaratory suit nugatory.
12. Further, the claim against the respondent is meritorious with a high probability of success. That, the interested party having already taken out warrants of arrest against him, he would be subjected to humiliation.
13. He stated that, the principles governing of stay of execution include whether there has been undue delay in making the application, and whether the application will occasion prejudice to the other parties.
14. He reiterated that the respondent was fully aware of the judgment but neglected to and/or failed to satisfy the decretal amount. Further, he instructed his advocates to make the present application in haste as the interested party had obtained warrants of arrest against him. That the application is made in good faith.
15. The application was disposed of by filing of submissions. The applicant in his submissions dated 16th November 2022, argued that while Order 22 Rule 22 of the Civil Procedure Rules does not provide for stay of a judgment pending hearing and determination of suit, in the absence of such a provision, courts have in exercise of the judicial discretion relied on the same provisions to grant the orders. Reference was made to the case of Francis Ndahebwa Twala v Ben Nganyi [2108] eKLR .
16. The applicant submitted that he has met the principles of stay of execution, in that there is no inordinate delay in filing this application as he moved the court after the respondent failed to respond to the notice of judgment in the subordinate court and the interested party obtained warrants of arrest against him.
17. Further, he has demonstrated that he will suffer substantial loss if stay is not granted, as he will be deprived of his freedom and liberty, and the declaratory suit rendered nugatory. That the interested party will not suffer any prejudice if orders are granted.
18. That he had a legitimate expectation that under the provision of section 10 (1) of the Insurance (Motor Vehicle Third Party Risk) Act Cap 405, the respondent would pay the decretal sum. Further, his incarceration for failure to pay a civil debt will amount to punishing and humiliating him. He relied on the case of; Zippoah Wambui Muthara: Milimani BC Casuse 19 of 2010, citing the case of Innocnet G. Ondieki v Julius Nakaya Kabole [2019] eKLR.
19. On its part, the interested party vide submissions dated 31st October 2022, argued that the applicant has not met the conditions for stay of execution as set out in Order 42 Rule 6 of the Civil Procedure Rules, 2010. That, the application was not filed timeously considering that a period of one (1) year and seven (7) months have lapsed since judgment was entered and the delay is not explained. She relied on the case of; Abdulraham Adam Hassan vs National Bank of Kenya Ltd Kisumu High Court Civil Case



No 446 of 2001 where the court held that an unexplained delay of three (3) months was unreasonable and Nginyaga Kavole vs Mailu Gideon Misc Application No. 401 of 2018 where it was held that the applicant was under a duty to explain a five (5) month delay.

20. Further, the applicant has failed to demonstrate the substantial loss he will suffer. That the application is meant to frustrate and delay the execution proceedings. Further the applicant can settle the decretal amount and pursue a refund from the respondent. She relied on the case of Shell Ltd vs Kibiru & Another Civil Appeal No. 97 of 1986, Nairobi where it was held that there was no evidence of substantial loss and that loss cannot be inferred.
21. Furthermore, the applicant has not offered security for due performance of the decree or security for costs and therefore the application should be dismissed with costs. But if the court is inclined to grant the orders sought by the applicant, the applicant be ordered to deposit the entire decretal sum in court. That, in the case of Alois Ochieng Ndege vs Explico Insurance; Jane Wachuka Munene (Interested Party) [2022] eKLR it was held that the provision of security for due performance of the decree is a mandatory requirement for the grant of an order for stay of execution. Finally, under section 27 of the Civil Procedure Act, costs shall follow the event unless the court or judge for good reason orders otherwise.
22. At the conclusion of the arguments by the parties, I have considered the materials before the court and I find the following issues have arisen for determination: -
 - a. Whether the respondent was placed under liquidation vide a ruling of the court dated; 7th November 2019.
 - b. Whether the threshold for grant of orders sought has been met.
 - c. Whether the orders sought should be granted.
 - d. Who will pay costs of the application.
23. As regard the first issue, I note it is settled law that, he who alleges proves. In the instant matter, although the decision cited by the interested party allowed liquidation of the respondent, it appears from the decisions subsequently delivered as produced by the applicant that, the respondent has never been placed under liquidation. The interested party should have produced evidence from the Registrar of Companies to prove their allegations.
24. In that case I concur with the submissions of the applicant that, he did not have to seek for the leave pursuant to section 432 (2) of the Insolvency Act No. 18 of 2015 to file the application herein. Even then the respondent that is a party herein has not stated it is under liquidation and the interested party cannot canvass the matter on its behalf.
25. In considering the second issue, I note that Order 42 Rule 6 (2) states as follows: -
 - “(2) 2) No order for stay of execution shall be made under sub-rule (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”.



26. Pursuant to the aforesaid I find that the Court of Appeal in *CMC Holdings Ltd vs. Nzioki* [2004] KLR 173: stated that:
- “In an application for setting aside ex parte judgement, the court exercises its discretion in allowing or rejecting the same. That discretion must be exercised upon reasons and must be exercised judiciously...”
27. The threshold of granting stay of execution is basically: proof of timely filing the application, substantial loss to be suffered and provision of security for performance of the decree as observed in; *Antoine Ndiaye v African Virtual University* [2015] eKLR. In the instant matter, judgment in question, was delivered on 17th September 2020, the applicant served with a notice thereof on 30th September 2020. The decree was issued on 9th December 2020, while the warrants of arrest were issued on 1st July 2021.
28. It is noteworthy that, the period that has lapsed since the impugned judgment was delivered is over one (1) year. The explanation offered by the applicant is that the respondent failed to pay the decretal sum, however, that explanation is not tenable in that the applicant cannot have failed to institute the declaratory suit for over one year, and therefore I find there has been inordinate delay in filing the application.
29. On substantial loss, there is no evidence that the applicant is a man of straw. The amount involved is relatively reasonable taking into account the applicant owns a vehicle that is in business. If the money is paid and the suit is successful, the applicant suit always recovery of the same from the respondent. On the flipchart, if the suit is dismissed, the applicant will be released from any further claim by the interested party. Indeed, the only way to stop interest from accruing is to pay and seek for indemnity from the respondent.
30. It suffices to note that, the applicant has not offered security as the court orders for the due performance of such decree. As such the scale as to who will suffer prejudice if the stay of execution is granted tilts in favour of the interested party.
31. Indeed, the continued delay of the matter will prejudice the interested party who suffered injuries and is entitled to compensation yet has been waiting for over two and a half (2 ½) years to enjoy the fruits of judgment. Justice is balanced on the scale. Thus to allow the applicant to continue litigating when the interested party has no remedy will amount to injustice. Therefore, the argument by the applicant that the interested party will not suffer prejudice is not tenable.
32. The last issue is whether the orders sought should be granted, I note that Order 22 Rule 22 of the Civil Procedure Rules does not provide for stay of execution pending the hearing of a suit. To grant orders sought, is based on the discretion of the court, to be exercised in the interest of justice.
33. In that case, to balance between right of the applicant to allow the applicant’s suit to be heard and the interested party’s right to enforce the fruits of judgment I order that, there shall be stay of execution of the judgment herein pending the hearing and determination of the suit on condition that: -
- a. The applicant pays the interested party 50% of the decretal sum (as stated in the decree) within thirty (30) days of the date of this order.
 - b. The balance thereof, be deposited in an interest earning account in the name of both parties or lawyers within forty-five (45) days of the date of this order.



- c. The suit herein be set down for hearing and concluded within six (6) months of the date of this order.
- d. Failure to comply with orders (a) and (b) above execution to proceed without further recourse to court.
- e. The warrants of arrest will stand discharged upon compliance with the orders in (a) and (b).
- f. Costs to be in the main cause.

34. It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 26TH DAY OF APRIL 2023

GRACE L NZIOKA

JUDGE

In the presence of:

Mr. Wainaina for the applicant

Mr. Mutungi h/b for Mr. Wanjohi for the interested party

Ms. Ogutu Court Assistant

