



**Mwangaza General Supplies & Contractors Limited v Royal Insurance Brokers & 2 others (Civil Appeal E053 of 2023) [2023] KEHC 18438 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18438 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS**

**CIVIL APPEAL E053 OF 2023**

**FROO OLEL, J**

**MAY 25, 2023**

**BETWEEN**

**MWANGAZA GENERAL SUPPLIES & CONTRACTORS  
LIMITED ..... APPELLANT**

**AND**

**ROYAL INSURANCE BROKERS ..... 1<sup>ST</sup> RESPONDENT**

**FEDILITY INSURANCE CO LTD ..... 2<sup>ND</sup> RESPONDENT**

**JEFFERSON KIMONYI NDABUKI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application before this court is the Notice of Motion application dated 17<sup>th</sup> March 2023 brought pursuant to provisions of Section 1A, 1(B) and 3A of the [Civil Procedure Act](#), Order 42 Rule 6(2) and Order 51 of the Civil Procedure Rules and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayer sought is prayer (3) & (4) that;
  - a. That this Honourable court be pleased to stay the execution of the judgment and decree in Machakos CMCC NO 408 of 2019 against the appellant pending the hearing and termination of the Appeal herein.
2. This application is supported by an affidavit of the appellant/applicant director, one Peter Mbui Mutinga dated 17<sup>th</sup> March 2023. This application is opposed by the 2<sup>nd</sup> interested party Jefferson Kimonyi Ndabuki who filed a replying affidavit dated 29<sup>th</sup> March 2023. Both the appellant/applicant and 2<sup>nd</sup> interested party did file written submissions in support of their respective positions. On 19<sup>th</sup> April 2023, when the parties appeared before court for directions, counsel's for the respondent Mr. Godfrey Isiolo and Mr Muma for the 1<sup>st</sup> interested party indicated to the court that the suit as against their respective client's was dismissed in the lower court and thus, they had no interest in this application and would not participate in the same.



## Brief Facts

3. The Appellant averred that its director one Mr. Peter Mbui Mutinga entered into an agreement with the respondent to insure the appellants motor vehicle Toyota Land cruiser Registration Number KCA 100J (hereinafter referred to as the insured Motor vehicle) with a comprehensive insurance cover. The comprehensive cover issued under Fidelity Insurance co Ltd; Policy No 503/0910/17 for one year and was due to expire on 20<sup>th</sup> September 2018. The applicant averred that he paid all the premium due under the said policy for him to enjoy comprehensive cover for the suit motor vehicle.
4. On 7<sup>th</sup> August 2018, the insured motor vehicle was involved in a road traffic accident with motor vehicle registration number KBU 583J and the matter was reported at Machakos police station. Further it was also reported to the respondent as the brokerage firm that received premium money and issued the insurance policy. The 2<sup>nd</sup> interested party filed a civil suit to claim damages in tort for injuries sustained in the said accident . The case filed was Machakos CMCC No 408 of 2019, wherein judgment was made in favour of the said 2<sup>nd</sup> interested party. The respondent and 1<sup>st</sup> interested party refused to settle the said decretal sum thereby forcing the applicant to file Machakos CMCC No E277 of 2022 seeking declaratory orders as against the said respondent and 1<sup>st</sup> interested party herein.
5. The appellant filed an application seeking to stay the judgment and decree issued in Machakos CMCC No 408 of 2018, pending hearing and determination of the declaratory suit filed, where they had sort for orders to compel the respondent and 1<sup>st</sup> interested party to settle the decretal sum owed to the 2<sup>nd</sup> interested party. The applicant's application was dismissed, which has given rise to this appeal.
6. The appellant stated in their supporting affidavit that the respondent and the 1<sup>st</sup> interested party refused to honour and settle the judgment that was passed against him and that the 2<sup>nd</sup> interested party had been very aggressive in seeking settlement of the decree passed in Machakos CMCC No 408 of 2019. The said 2<sup>nd</sup> interested party had instructed Falcon Recovery Auctioneers to proclaim the suit motor vehicle KCA 100J – Toyota land cruiser, with a view of selling it to recover the sums claimed under the decree.
7. Further the appellant averred that the declaratory suit pending before the chief Magistrate being Machakos CMCC NO E277 of 2022 had high chances of success. The appeal filed too was arguable and if execution was levied before the said appeal is heard and determined, it would be rendered the appeal nugatory. It was therefore in the interest of justice to stay the decree issued in Machakos CMCC NO 408 of 2019 pending hearing and determination of the declaratory suit and the appeal filed.
8. The 2<sup>nd</sup> interested party did oppose this application by his Replying Affidavit dated 29<sup>th</sup> March 2023. He states that he filed a suit (Machakos CMCC No 408 of 2019) against the appellant herein, seeking damages arising from an accident in which the suit motor vehicle was involved. The appellant did file their defense on 7<sup>th</sup> August 2019 and later took out third party proceedings to enjoin the 1<sup>st</sup> interested party herein as a third party. The 1<sup>st</sup> interested party after being enjoyed, filed their defense and thereafter also took out third party proceedings to enjoin the respondent's herein. The Respondent too filed their statement of defense.
9. The 2<sup>nd</sup> interested party further averred that on 9<sup>th</sup> February 2022 directions were taken in the primary suit Machakos Cmcc No 408 of 2019, where liability as between the plaintiff (the 2<sup>nd</sup> interested party herein), defendant (now appellant), third party (now 1<sup>st</sup> interested party), and 2<sup>nd</sup> third party (now Respondent) be tried at the same time. The matter was heard on merit and vide a judgment dated 30<sup>th</sup> June 2022 liability was apportioned at 70%: 30% against the plaintiff (now 2<sup>nd</sup> interested party) and defendant (now appellant herein). The suit as against the third parties was dismissed with costs.



The 2<sup>nd</sup> interested party also stated that no appeal was preferred by the appellant herein as against the said judgment delivered in Machakos CMCC NO 408/2019. The appellant did not pay the decretal sum and filed an application dated 6<sup>th</sup> September 2022 in the primary suit, where he sought for stay of the said decree issued. Vide a ruling dated 10<sup>th</sup> November 2022, he was given 30 more days to pay the decretal amount but still failed to do so.

10. The 2<sup>nd</sup> interested party further averred that the appellant filed a declaratory suit being Machakos CMCC NO E277 of 2022 and sought stay of the decree issued in Machakos CMCC NO 408 of 2019. His application was dismissed hence, this appeal. The 2<sup>nd</sup> interested party stated that the parties in both suits are the same and so is the cause of action and issues for determination and thus suit Machakos CMCC NO 277/2022 is now RES JUDICATA since all issues relating to liability were determined in suit Machakos CMCC 408/2019.
11. The final issue raised by by the 2<sup>nd</sup> interested party in his submissions was that ;
  - a. The judgment sought to be stayed in CMCC NO 408/2019 has never been appealed against.
  - b. Stay in CMCC NO. 408/2019 was granted and appellant failed to comply.
  - c. The suit No 277/2022 whose ruling is the subject of the present appeal is not heard and determined and the same is RES JUDICATA.
  - d. The applicant has not placed material particulars of any substantial loss that is likely to be suffered if any.
  - e. That the applicant Is not even willing to provide security for the decretal sum

### **Submission**

12. The Appellant filed his submissions on 18th April 2023 and stated that the only issue for determination was whether this court should grant stay of execution of the judgment and decree issued in Civil suit 408/2019 pending hearing and determination of the appeal filed herein. The appellant stated that under Order 42 Rule 6{1} and {2} of the civil procedure rules there were three conditions to be meet. These were;
  - a. Firstly, the court is satisfied that substantial loss may result to the applicant unless the order of stay is granted.
  - b. The application has been made without unreasonable delay.
  - c. Thirdly, the applicant has provided 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.
13. The appellant submitted that they had demonstrated a clear and arguable case that warranted granting of the stay orders sought and stated that if execution was not stopped the appeal would be rendered nugatory. They relied on the citation of Stanley Kangethe Kinyanjui Vs Tony Ketter & 5 others {2013} eklr, Twiga chemicals Industries Limited Vs Gichuki Kingara & co Advocates {2020} ekl & Thomas Muoka Muthoka & Another Vs Insurance company of East Africa Limited . Limited Nairobi {Millimani HCCC 795 of 1997 }
14. On the issue of substantial loss, the appellant submitted that, the 2<sup>nd</sup> interested party had already started the execution process and proclaimed their motor vehicle Toyota land cruiser Registration Number KCA 100J, which the appellant used for their business and if attached and sold, they would suffer loss. There was therefor need to preserve the suit property so that the rights of the appellant are safeguarded.



The appellants relied on the citations of Quest Resources limited Vs Japan Port Consultants limited {2015}eklr, RWW Vs EKW {2019} Eklr, Nicholas Stephen Okaka & Another Vs Alfred Waga Wasonga {2022} Eklr & Stanley Kanethe Kinyajui Vs Tonny Ketter & 5 others{supra}.

15. The appellant also urged this court to find that, the appeal and this application was filed without undue delay. Finally on the issue of security they submitted that the applicant was not seeking to appeal as against the judgment and decree but was seeking to be granted stay of execution to enable him prosecute his declaratory suit in the lower court. The issue of offering security would therefore not arise in this instance.
16. The 2<sup>nd</sup> interested party did file their submissions on 19<sup>th</sup> April 2022 and highlighted the salient facts as earlier established by the replying affidavit, he had filed. On substantial loss the 2<sup>nd</sup> interested party stated that the appellant had not placed before court an affidavit to show what substantial loss he would suffer nor did he particularized the same to show how paying the decree would affect its operations. Reliance was place on Kenya shell Limited Vs Kibiru {1996}, Eklr , where the court held that if there is no evidence of substantial loss an appeal will not be rendered nugatory.
17. Secondly the appellant/applicant had failed to establish the requirements of granting stay, as no appeal had been filed against the degree sought to be stayed, no loss had been shown, which the applicant would likely suffer, no sufficient cause had been shown as all issues had been determined in the initial suit Machakos CMCC 408/2019 and finally this application had been filed late and in bad faith as the applicant had been granted a further stay of execution in Machakos CMCC 408/2019 but had failed to comply and make payments. Reliance was placed in Macharia T/A Macharia & Co Advocates Vs East Africa Standard {No 2} 2002 eKLR.
18. The final issue raised was that the suit Machakos CMCC NO 277/2022 was Res Judicata and the present appeal filed from the said suit was a nullity as it offended provisions of Section 7 of the [civil procedure Act](#). The parties litigating was the same, litigating over the same issue and a determination had been made based on competent proceedings. The 2<sup>nd</sup> interested party submitted that the upshot was that this application was incompetent and ought to be dismissed.

### **Analysis & Determination**

19. I have carefully considered the Application, Supporting Affidavit, the 2<sup>nd</sup> interested party Replying Affidavit and the written submissions filed by both parties and the only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay pending appeal.
20. Stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. It is evident from the said provision that power to grant stay of execution pending appeal is an exercise of discretion of the court on sufficient cause being shown by the Applicant that substantial loss may result to the applicant if the orders are denied; the application should be made without undue delay and the court will impose such security as the court may impose for the due performance of any decree or order as may ultimately be binding on the Applicant.
21. As stated in the case of Amal Hauliers Limited Vs Abdulnasi Abukar Hassan (2017) eKLR which quoted with approval Butt Vs Rent Tribunal (1982) KLR 417 the guiding principles which the court should consider while determining an application of this nature. These were;
  - a. The power of the court to grant or refuse an application for stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.



- b. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not to be rendered nugatory should that appeal court reverse the judge’s discretion.
  - c. A judge should not refuse stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
  - d. The court in exercising the discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the cases and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the Appellant had an undoubted right of appeal.
  - e. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.
  - f. The Appellants finally averred that this court is clothed with very wide discretion to grant the orders sought under Section 3A as read together with Section 63(c) of the [Civil Procedure Act](#).
22. The basic and undeniable fact herein is that there is a valid and enforceable decree dated 30<sup>th</sup> June 2022, issued in Machakos CMCC 408/2019, which decree has not been settled and there is no appeal filed as against the said judgment/ decree. The appellant has filed a subsequent suit being Machakos CMCC NO 277/2022 and the parties in the said declaratory suit and those in Machakos CMCC 408/2019 are the same parties. The appellant in his submissions filed in court on 18<sup>th</sup> April 2023, was also categorical that; “we submit that the applicant is not appealing against the judgment and decree but is seeking to be granted a stay to enable him prosecute his declaratory suit in the lower court. We submit that the requirement for security will therefore not arise in this case considering the declaratory suit is yet to be heard”.
23. It is basic law that provisions of Order 42 rule 6 of the civil procedure rules, cannot come into play unless there is an appeal filed as against the said decision/judgment/ruling/decree and or order. No appeal has been filed against the judgement and decree issued on 30<sup>th</sup> June 2022 in Machakos CMCC NO 408/2018 and therefor there is no basis of granting the orders staying its execution based on a second suit, which is not challenging the decree but is filed to determine third party contractual obligations under the Insurance (Motor vehicle third party risk) Act.
24. That would only leave this court to determine if stay of execution should be granted under Section 1A, 1B and 3A of the [civil procedure Act](#) which allows court to act expeditiously, proportionately in determining disputes, while noting that nothing shall limit or otherwise affect the inherent power of the court to make such orders as maybe necessary for the ends of justice. As stated by Justice G.v Odunga In Machakos Hcca No E36 Of 2021 Indus Trading Limited & Ano Vs Charles Aricha;
- “It is therefore important that the court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to undesirable or absurd outcome. what the court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible , to secure that any transitional motions before court do not render nugatory the ultimate end of justice”.



25. The Black's law Dictionary (Tenth Edition) defines Judicial discretion as;

“The exercise of judgment by a judge or court based on what is fair under the circumstance and guided by the rules and principles of law; a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right”.

26. Discretion vested in court is dependent upon various circumstances which the court has to consider amongst them the need to do real and substantial justice to the parties to the suit and must be exercised in adherence to sound and reasonable Judicial principles. The court in exercising discretion should therefor always opt for the lower risk rather than the higher risk of injustice. See Suleiman Vs Amboseli Resort Limited {2004} 2KLR. This proposition was also espoused by Justice Warsame (as he was then) in Samvir Trustee Limited Vs Guardian Bank Limited Nairobi (Millimani )HCC 795 of 1997 where he expressed himself as hereunder

“Every party aggrieved with a decision of the high court has a natural and undoubted right to seek intervention of the court of appeal and the court should not put unnecessary hinderance to the enjoyment and exercise of that right by a defendant. A stay would be overwhelming hinderance to the exercise of the discretionary power of the court.....The court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yard stick is for the court to balance or weigh the scales of justice by ensuring that the appeal is not rendered nugatory, while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusions. The respondent is asserting that matured right against the applicant/defendant ..... For the applicant to obtain stay of execution, it must satisfy the court that substantial loss would occur if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention..... At the stage of the application of stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and one equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The court is therefor empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court”.

27. Guided by the above authorities I do find that this is not a proper and just case where I should exercise discretion in favour of the applicant. The declaratory suit does not involve the 2<sup>nd</sup> interested party, what the appellant proposes to enforce is an insurance contractual relationship as between him, the respondent and interested party. The 2<sup>nd</sup> interested party having secured his decree in Machakos CMCC NO 408/2019 is entitled to enjoy the fruits of his judgment as no appeal has been filed to challenge it. secondly the applicant has not established substantial loss he would suffer if he paid the decretal sum. In any event if he succeeds in his declaratory suit filed as against his insurer { which is a long established and stable insurance firm}, he is guaranteed to recover such amounts used to settle the decree.

28. Finally, this court also holds that it is legally untidy and it constitutes an abuse of the process of court to use the declaratory suit to seek to stay a decree from a concurrent court, which had jurisdiction to



hear a matter. Such stay could only be sort in the same suit that issued the decree or at the appellate court, if an appeal was filed.

29. The 2<sup>nd</sup> interested party also raised the issue that Machakos CMCC NO 277/2022 was a nullity and res judicata since all the issues regarding liability as between all the parties herein was heard and determined in, Machakos CMCC NO 408/2019. The appellant did not deny the 2<sup>nd</sup> interested party averments that he did enjoin his insurer as the third party in Machakos CMCC NO 408/2019. The insurer in turn enjoined the respondent as the 2<sup>nd</sup> third party. It was agreed that the issue of liability as between the three parties would be determined simultaneously with all other issues at hand in the said suit and eventually the suit as against the respondent and 1<sup>st</sup> interested party was dismissed.

30. The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

31. The Black’s law Dictionary 10<sup>th</sup> Edition defines “res judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

32. A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve any issues, involving the same parties and determine all matters in dispute in an action so as to avoid multiplicity of actions. In order therefore to decide as to whether an issue in a subsequent suit is res judicata, a court of law should always look at the decision a party claim’s to have settled the issues in question and the entire suit to ascertain;

- i. What issues were really determined in the previous suit;
- ii. Whether they are the same in the subsequent suit and were covered by the Decision.
- iii. Whether the parties are the same or are litigating under the same Title and that the previous suit was determined by a court of competent jurisdiction.

33. Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported), held that:

“If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

34. In the Court of Appeal case of Siri Ram Kaura – Vs – M.J.E. Morgan, CA 71/1960 (1961) EA 462 the then EACA stated that: -

“The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...”



The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...

The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application. It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit.”

35. Hon. Justice G.V. Odunga in Republic – Vs – Attorney General and Another Exparte James Alfred Koroso, expressed himself thus on the issue of access to justice: -

“Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts or tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others.”

36. I do find that to the extent that the issue of liability had been conclusively dealt with as between the appellant, respondent and 1<sup>st</sup> interested party in Machakos CMCC NO 408/2019, to litigate over the same issue in Machakos CMCC NO 277/2022 would fall foul of the provisions of section 7 of the *civil procedure Act*. The declaratory suit Machakos CMCC NO 277/2022 cannot be used to stay the decree issued in Machakos CMCC NO 408/2019. That would be untenable in law.

### **Disposition**

37. Taking all relevant factors into consideration I do find that;
- a. The application dated 17<sup>th</sup> March 2023 is wholly unmerited and the same is dismissed with costs to the 2<sup>nd</sup> interested party.
  - b. The costs are assessed at Ksh.30,000/= all-inclusive and the same is to be paid within thirty {30} days from the date of delivery of this ruling in default the 2<sup>nd</sup> interested party will be at liberty to enforce the same.
38. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF MAY 2023.**

**RAYOLA FRANCIS**

**JUDGE**

Delivered on the virtual platform, Teams this 25<sup>th</sup> day of May 2023

**In the presence of;**



.....For Appellant  
.....For Respondent  
.....Court Assistant

