



REPUBLIC OF KENYA



KENYA LAW
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**Bulla v Heritage Insurance Company Limited (Civil Case E001 of 2023)
[2023] KEHC 22865 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22865 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL CASE E001 OF 2023
RL KORIR, J
SEPTEMBER 29, 2023**

BETWEEN

DAVID OSANO BULLA PLAINTIFF

AND

HERITAGE INSURANCE COMPANY LIMITED RESPONDENT

RULING

1. The Applicant filed a Notice of Motion Application dated 28th March 2023 in which he sought the following Orders:-
 - I. Spent.
 - II. Spent.
 - III. That pending the hearing and determination of the main suit herein the Honourable Court be pleased to give an order staying the proceedings, issuance of warrants of attachment and sale, execution of Judgment delivered on 8th March 2023 and/or execution proceedings in Bomet SPMCC No. 49 of 2019 *Nelson Cheruiyot Kirui v David Osano Bulla & Sammy Maina Karanja* and in Bomet SPMCC No. 62 of 2019 *William Kipsang Kipkorir v David Osano Bulla & Sammy Maina Karanja*.
 - IV. That costs of this application be provided for.
2. The Application was brought under Article 10 (2) (b) of the [Constitution of Kenya](#), Section 10 of the [Insurance \(Motor Vehicle Third Party Risks\) Act](#), Sections 1A, 1B, 3 & 3A of the [Civil Procedure Act](#) and Order 51 of the [Civil Procedure Rules](#). The Application was based on the grounds on the face of the Application and further by the Supporting Affidavit sworn by David Osano Bulla on 28th March 2023.



The Applicant's Case.

3. The Applicant stated that his Motor Vehicle, a Toyota Prado Registration Number KBA 969Y was insured by the Respondent, Heritage Insurance Company Limited and the said insurance was to cover the Applicant against any third party risk or liability that would arise out of the use of his motor vehicle.
4. The Applicant stated that on 11th February 2019, his vehicle was involved in a road traffic accident along Bomet-Mulot road with a Nissan Caravan Registration Number KCF 365A. That as a result of the accident, he was sued in Bomet SPMCC No. 49 of 2019 *Nelson Cheruiyot Kirui v David Osano Bulla & Sammy Maina Karanja* and in Bomet SPMCC No. 62 of 2019 *William Kipsang Kipkorir v David Osano Bulla & Sammy Maina Karanja*.
5. It was the Applicant's case that the Respondent was duly notified by a statutory notice and was even made a party to the proceedings in the trial court through a third party notice. That the Respondent's participation in the third party proceedings was halted when the trial court ruled in their favour after they had raised a preliminary objection.
6. The Applicant stated that the trial court on 8th March 2023 delivered Judgments in Bomet SPMCC No. 49 of 2019 *Nelson Cheruiyot Kirui v David Osano Bulla & Sammy Maina Karanja* and Bomet SPMCC No. 62 of 2019 *William Kipsang Kipkorir v David Osano Bulla & Sammy Maina Karanja* in favour of the Plaintiffs to the cumulative sum of Kshs 590,681/=.
7. It was the Applicant's case that he risked the loss of his property to the imminent execution by the Plaintiffs (Nelson Cheruiyot Kirui and William Kipsang Kipkorir). That he had already been served with a purported notice of entry of Judgment and that execution was imminent. It was the Applicant's further case that there was no justification as to why he should suffer loss yet he had taken out an insurance cover to insure him against such risks and liability.
8. The Applicant stated that the Respondent had a statutory and contractual mandate to satisfy the decretal amount awarded by the trial court.

The Response.

9. The Respondent filed a Replying Affidavit dated 13th April 2023 and stated that its participation in Bomet SPMCC No. 49 of 2019 *Nelson Cheruiyot Kirui v David Osano Bulla & Sammy Maina Karanja* and Bomet SPMCC No. 62 of 2019 *William Kipsang Kipkorir v David Osano Bulla & Sammy Maina Karanja*, was halted after it was struck out as a party through the Rulings which were delivered on 24th November 2021.
10. It was the Respondent's case that at the time of the alleged accident, no Policy cover existed between the parties. That the Policy between them being number 101877001233 was signed on 10th March 2018 and on 25th April 2018, the Applicant was issued with a 14 day cancellation notice for failure to pay premiums. It was the Respondent's further case that on 11th May 2018, the Policy was cancelled for non-payment of premiums. That a refund on the initial payment was made to the Applicant.
11. The Respondent stated that the claim on indemnity against it was not tenable and that the present Application infringed on the doctrine of privity of contracts.

The Applicant's further affidavit.

12. The Applicant filed a further affidavit dated 2nd May 2023 in response to the Respondent's Replying Affidavit. He stated that he was issued with a valid insurance policy for one year and was given an



- insurance sticker. That there was no way he could have been issued with the valid one year cover without complying with the Respondent's requirements. He further stated that there existed a valid insurance policy between the parties at the time of the accident.
13. It was the Applicant's case that the Insurance Policy was never cancelled and there was no proof of the same. That the documents the Respondent relied on as proof of cancellation were an afterthought and were cunningly crafted for the Respondent to evade its responsibility under the Insurance Policy. It was the Applicant's further case that the KRA Pin and address used in the Respondent's documents were not his.
 14. The Applicant opined that if the policy was cancelled (of which he denied it was) then the Respondent would have used his phone number or email address to communicate, but it never did. The Applicant further opined that he was not refunded any money by the Respondent.
 15. It was the Applicant's case that the third party proceedings were premised on the legal position that the proper forum of liability between himself and the Respondent would be the present declaratory suit.
 16. On 19th April 2023, I directed that the present Application be canvassed by way of written submissions.

The Applicant's Written Submissions.

17. The Applicant submitted that applications of this nature were governed by well-known principles i.e. whether there was a prima facie case to be tried, whether the Applicant would suffer irreparable harm if the injunction was not granted and that if the court was in doubt, it would decide on a balance of convenience. He relied on *Paul Gitonga Wanja v Gathuthi Tea Factory Ltd & 2 others* (2016) eKLR and *Lucy Wangui Gachara v Minudi Okemba Lore* (2015) eKLR.
18. It was the Applicant's submission that on the material placed before this court, he had an arguable case and that if the orders sought were not granted, his rights to property would be infringed upon as his possessions would be at the imminent risk of auction.
19. The Applicant submitted that his legitimate expectation in taking out an insurance policy was at the risk of infringement and the same was linked to the Respondent's right to fair administrative action. That under Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, the Respondent was enjoined to satisfy Judgments in the lower court proceedings on behalf of the Applicant and a refusal by the Respondent to satisfy the same negated his rights.
20. It was the Applicant's submission that the harm that would be occasioned if his possessions were auctioned could not be quantified because the labour, care and investments could not be monetarily cured. It was the Applicant's further submission that he was married and had school going children and any financial setback would lead to turmoil in his and his family's life. That the court should take judicial notice that it was not uncommon to have divorce proceedings due to debts or financial struggles and that such things could not be cured or quantified monetarily.
21. The Applicant submitted that the Respondent's failure to make good the liability that arose from the insurance policy between them, his legitimate expectation and the dictates of fair administrative action are things that he continued to suffer and they could not be quantified by money. That the mental turmoil, anguish and the continued state of living in fear despite having taken out an insurance cover could not be quantified monetarily unless this court intervened by granting the orders sought.
22. It was the Applicant's submission that he stood to suffer more than the Respondent if the orders sought were not granted. That the Respondent did not stand to suffer any harm as its property was not under



the risk of an auction. It was the Applicant's submission that there would be no prejudice occasioned to the Respondent if execution proceeded.

23. The Applicant submitted that the Respondent had nothing to lose if the orders sought were granted or denied and that the same could not be said about the Applicant. That he stood to lose so much and was highly aggrieved by the Respondent's unlawful actions.

The Respondent's Written Submissions.

24. The Respondent submitted that the Judgment was delivered on 8th March 2023 and the current Application was dated 28th March 2023. That the 20 day period that the Applicant delayed in moving the court had not been explained.
25. Regarding substantial loss, the Respondent submitted that the Applicant had to show that if stay was not granted, he was at a risk of substantial loss. It relied on *Nicholas Mutuku Mwasuna v Patricia Mueni Kilonzo* (2022) eKLR. That such evidence would be in two limbs; first, that by paying the decretal sums, difficulty would be occasioned upon them and secondly, that if they paid the decretal sum and the suit was decided their favour, they would not recover the money from the Applicant. It relied on *Jamii Bora Bank Limited & another v Samuel Wambugu Ndirangu*. (Civil Appeal No. E030 of 2021)
26. It was the Respondent's submission that there was no evidence of substantial loss tendered by the Applicant. That if this court disagreed with the Applicant's pleadings, they would settle the decretal sum and if the court agreed with his pleadings then the Respondent would be obligated to indemnify the Applicant and he would thus recover the sum due to him. It was the Respondent's further submission that it was a well-known corporate entity with assets and offices and it would be impossible for the Applicant not to recover money from the Respondent if the suit succeeded. That this particular condition for stay had not been satisfied by the Applicant.
27. The Respondent submitted that the Applicant should have requested the court to be allowed to put in security in the event that his suit was unsuccessful. It relied on *Jamii Bora Bank* (*supra*) and *Ena Investment Limited v Benard Ochau Mose & 2 others* (2022) eKLR. That this particular condition for stay had not been satisfied by the Applicant.
28. It was the Respondent's submission that the Applicant enjoined it in the primary suits and they were struck out as the Applicant did not have a triable case against it. The Respondent further submitted that the Applicant's suit herein had substantially been litigated upon and decided and that this court was unlikely to depart from the decision of the trial court especially because the Applicant did not appeal the Ruling that struck them out of the trial suit.
29. At this point, I would like to point out that the Applicant erroneously submitted on the principles governing the grant of injunctions as opposed to the issue herein which was whether he had satisfied the requirements for the grant of stay of execution which he sought.
30. I have gone through and carefully considered the Notice of Motion Application dated 28th March 2023, the Repeating Affidavit dated 13th April 2023, the Further Affidavit dated 2nd May 2023, the Applicant's Written Submissions dated 1st May 2023 and the Respondent's Written Submissions dated 5th May 2023 and I sieve two issues issue for my determination
- i. Whether the suit was properly filed before this court
 - ii. Whether the Applicant had satisfied the requirements for the grant of stay of execution.



i. Whether the suit was properly filed before this court

31. The Applicant sought a Declaratory Order in the main suit against the Respondent for the cumulative decretal amount of Kshs 590,681/=. The cumulative decretal sum arose from Bomet Principal Magistrate Civil Suits Numbers 49 and 62 of 2019 where the subordinate court gave Judgments in favour of the Plaintiffs (Nelson Cheruiyot Kirui and William Kipsang Korir) to the tune of Kshs 327,888/= and Kshs 262,800/= respectively.
32. By dint of Article 165(3) of the Constitution of Kenya, 2010, this court has unlimited original jurisdiction in criminal and civil matters save for matters exclusively within the jurisdiction of the Courts established pursuant to Article 162 of the Constitution. This means that this court has the jurisdiction to deal with the present declaratory suit.
33. That said, the pecuniary jurisdiction of the present suit fell within the jurisdiction of the Magistrate's court. Section 7 of the Magistrate's Court Act provides that:-

The Magistrates' Courts shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed—

- a. twenty million shillings, where the court is presided over by a chief magistrate;
 - b. fifteen million shillings, where the court is presided over by a senior principal magistrate;
 - c. ten million shillings, where the court is presided over by a principal magistrate;
 - d. seven million shillings, where the court is presided over by a senior resident magistrate; or
 - e. five million shillings, where the court is presided over by a resident magistrate
34. The question then became whether the Applicant being the Respondent's insured could file a declaratory suit in the subordinate court. In Corporate Insurance Company Ltd v Elias Okinyi Ofire (1999) eKLR, the Court of Appeal stated:-

“... as there is a certain amount of uncertainty in the profession as to whether or not a declaratory suit, such as was filed in the Senior Principal Magistrate's Court could be filed in the magistrate's court we find it necessary to deal with the point. Mrs. Nyaundi for the appellant argued that it was a matter of notoriety that such cases can only be filed in the High Court. She quoted no authorities to support her proposition. It is true that there is such a general belief as urged by Mrs. Nyaundi. But that is not correct. Section 3 (1) (c) of the Judicature Act Cap 8 Laws of Kenya, gives the High Court and all subordinate courts power to exercise jurisdiction in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1987.

“Court” as defined in the Civil Procedure Act means the High Court or a subordinate court, acting in the exercise of its civil jurisdiction.

“Suit” as defined in the Civil Procedure Act means all civil proceedings commenced in any manner prescribed.



... As "Court" includes a subordinate court it has jurisdiction to make a declaratory order such as was sought by the respondent, provided the value of the subject-matter is within the jurisdiction of that court."

35. It is my finding that the subordinate court has the jurisdiction to hear and determine the Applicant's Declaratory Suit. It is my further finding that this suit though being properly before this court, ought to be transferred to the subordinate court for disposal.

ii. Whether the Applicant had satisfied the requirements for the grant of stay of execution.

36. The principles that relate to Stay of Execution are well settled. Order 42 rule 6 of the *Civil Procedure Rules* stipulates:-

- “ 1. No appeal or second appeal shall operate as a stay of execution or proceedings 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 orders set aside.
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”.

37. Because the prayer sought is stay of execution pending the hearing and determination of the declaratory suit, the relevant provision would be Order 42 Rule 6(2) of the *Civil Procedure Rules*, in which an Applicant should satisfy the court that:-

- I. Substantial loss may result to them unless the order is granted.
- II. That the Application has been made without unreasonable delay.
- III. The Applicants have given such security as the court orders for the due performance of such Decree or order as may ultimately be binding to them.

38. Regarding the issue of substantial loss, the Court of Appeal in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* (1986) eKLR, held that:-

“Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”



39. In the persuasive case of *James Wangalwa & Another v Agnes Naliaka Cheseto* (2012) eKLR, Gikonyo J held that:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

40. The circumstances of this Application and by large the suit filed with the Application was that Judgments in Bomet SPMCC No. 49 of 2019 *Nelson Cheruiyot Kirui v David Osano Bulla & Sammy Maina Karanja* and Bomet SPMCC No. 62 of 2019 *William Kipsang Kipkorir v David Osano Bulla & Sammy Maina Karanja* were entered in favour of the Plaintiffs (Nelson Cheruiyot Kirui and William Kipsang Kipkorir) against the Applicant (then Defendant) for the cumulative sum of Kshs 590,688/=. The Applicant has filed a declaratory suit against the Respondent for the payment of the said cumulative decretal sum. It was on that basis that the Applicant sought for an order for stay of execution of the decrees and the eventual execution.

41. Regarding substantial loss, I have gone through and considered the Applicant’s supporting affidavit dated 28th March 2023 and his further affidavit dated 2nd May 2023 and I do not find any evidence of substantial loss. The grounds that the Applicant relied on cannot be ventilated and determined at this stage. They would be determined after parties have gone through a full trial and each party has had the opportunity to ventilate their case and present their evidence.

42. As I noted earlier, the Applicant did not address himself to the requirements of granting a stay in his submissions. The Respondent on the other hand did not address himself to the issue of substantial loss in his replying affidavit but chose to respond to the Applicant’s assertions on matters which cannot be determined at this stage. The Respondent however submitted that it was a well-known company with offices and assets and would be in a position to indemnify the Applicant should his declaratory suit be successful.

43. The burden was on the Applicant to show that he would suffer substantial loss if the stay order was not granted, a burden which he had failed to discharge. In the case of *Kenya Shell Limited (supra)*, it was held that:-

“... In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement.”

44. Based on the evidence before me, it is my finding that the Applicant did not prove the substantial loss that he would suffer.



45. On the issue of unreasonable delay, the court in *Republic v Attorney General & Another, Baps International Limited (Interested Party) Ex parte* (2020) eKLR, stated:-

“The concept of what is reasonable time is flexible, and will depend on the circumstance of a case, as held in *Law Society of Kenya v Attorney General & 2 others* [2016] eKLR. Relevant circumstance include the nature of the matter to which the inaction relates, any mitigating circumstances on the part of the decision make, and adverse consequences of delay, and the need to ensure fairness ...”

46. Judgments in the trial court were entered on 8th March 2023. The present Application for stay was filed on 4th April 2023 which was approximately 4 weeks after the Judgments in Bomet SPMCC No. 49 of 2019 *Nelson Cheruiyot Kirui v David Osano Bulla & Sammy Maina Karanja* and Bomet SPMCC No. 62 of 2019 *William Kipsang Kipkorir v David Osano Bulla & Sammy Maina Karanja* had been delivered. The period of one month was a reasonable timeline in my view and I so find.

47. Regarding security for the performance of the Decree, Gikonyo J in the persuasive case of *Arun C Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others* (2014) eKLR held that: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.

Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

48. Similarly in *Gianfranco Manenthi & Another v Africa merchant Assurance Co. Ltd* (2019) eKLR the court observed:-

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal....

Thus, the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue



of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine ...”

49. I have carefully gone through the pleadings and there was no indication by the Applicant on his willingness to pay security for the performance of the Decrees. This was an important requirement that the Applicant ought to have satisfied before a stay could be granted. It is therefore my finding that no security has been put forward by the Applicant.

50. That said, it is salient to note that the power of the court in deciding whether or not to grant a stay of execution is discretionary. In the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal held that

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. 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 be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a 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.
4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case 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.
5. 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.”

51. Also in the case of *Samvir Trustee Limited v Guardian Bank Limited* (UR), Warsame J (as he then was), held that:-

“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 yardstick is for the court to balance or weigh the scales of justice by ensuring that an 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 judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion”.

(See also *Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat* (2013) eKLR).

52. Clothed by the discretionary power and to balance the interests of both parties, it is my finding that the Applicant did not deserve to be driven away from the seat of justice and deserves his day in court.



It is my view that in these circumstances, justice would be done to all the parties if there was a stay of execution for a short period to enable the Applicant prosecute his declaratory case.

53. Before I pen off, I observe that there was a pending Notice of Motion Application dated 27th April 2023 by William Kipsang Korir and Nelson Cheruiyot Kirui who wanted to be enjoined as Interested Parties in the declaratory suit. The Application is unopposed and the same is granted.
54. In the end, having considered the submissions and affidavit evidence before me and in the analysis thereof, Prayer 3 of the Notice of Motion dated 28th March 2023 is granted on the following conditions:
- i. The Applicant to deposit Kshs 590,688/= the decretal sums in Bomet SPMCC No. 49 of 2019 *Nelson Cheruiyot Kirui v David Osano Bulla & Sammy Maina Karanja* and Bomet SPMCC No. 62 of 2019 *William Kipsang Kipkorir v David Osano Bulla & Sammy Maina Karanja* in court within 45 days hereof.
 - ii. In default of (i) above the orders of stay of execution shall stand vacated.
 - iii. William Kipsang Korir and Nelson Cheruiyot Kirui are enjoined as Interested Parties in the declaratory suit.
55. I observe that the Magistrate's Court has the pecuniary jurisdiction to hear and determine this suit. Consequently, I hereby transfer this suit to the Senior Principal Magistrate's Court, Bomet for hearing and final determination.
56. Costs shall follow the outcome of the Declaratory Suit.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF SEPTEMBER, 2023.

.....

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Olieti for the Plaintiff/ Applicant, N/A for the Defendant/ Respondent and Siele (Court Assistant)

