



REPUBLIC OF KENYA



KENYA LAW
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Karanja v Invesco Assurance Company Limited; Chege (Interested Party) (Civil Case E003 of 2023) [2023] KEHC 26574 (KLR) (15 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26574 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL CASE E003 OF 2023
CM KARIUKI, J
DECEMBER 15, 2023**

BETWEEN

JOHN KARANJA KURIA ALIAS JOHN KARANJA PLAINTIFF

AND

INVESCO ASSURANCE COMPANY LIMITED DEFENDANT

AND

STEPHEN MUCHEKE CHEGE INTERESTED PARTY

RULING

1. In the Application dated 12/5/2023, the Applicant sought prayers.
 - i. That pending the inter-partes hearing and determination of this suit, this Honourable Court be pleased to issue an order for a stay of execution of the judgment and decree in Nyahururu CMC Civil Case No. 315 of 2019.
 - ii. That this honourable court be pleased to grant any other order to stop the execution of the judgment and decree in Nyahururu CMC Civil Case No. 315 of 2019 against the plaintiff/ Applicant herein pending the hearing and final determination of this suit.
 - iii. That the costs of the Application be provided for:
2. The Affidavit of John Karanja supports the Application. The interested party opposes the Plaintiff/ Applicant via the Affidavit of Stephen Muccheke Chege sworn on 29/5/2023.
3. No response on record emanates from the defendant/respondent to oppose the Application or otherwise.
4. The Affidavit was served with the Application but has not contested the Application.



5. The matter is commenced via a plaint seeking a declaratory relief dated 12 May 2023. The remedy is sought against the Defendant (Insurance Organisation) in pursuit of satisfying the decretal amount in Nyahururu Chief Magistrate Civil Case No. 315 of 2019.
6. Parties were directed to canvass application via submission, which they filed and exchanged save for the Defendant
7. The applicant case is that:
8. The applicant's case is that he is an insured of the defendant/respondent concerning Insurance Policy Number 035/0804/9/010459/2017/02 issued under the [Insurance \(Motor Vehicles Third Party Risks\) Act](#), Cap. Four hundred five of the Laws of Kenya over Motor Vehicle Registration No. KCK 959J that the said motor vehicle was involved in a road accident on 25 January 2017, whereby the interested party instituted Nyahururu Chief Magistrate's Court Civil Case No.315 of 2019 - Stephen Mucheke Chege vs. John Karanja and another and judgment was passed in favour of the interested party on 4 February 2021, that under the [Insurance \(Motor Vehicles Third Party Risks\) Act](#), the duty to pay the judgment amounts awarded to injured third parties rests with the Insurer, that the defendant/ respondent has been informed of the judgment in the said Nyahururu Chief Magistrate's Court Civil Case No. 315 of 2019 but the defendant/ respondent has failed and or refused to pay the decretal sum in the said civil suit, that the applicant has been served with a Notice to Show Cause why he should not be committed to civil jail in satisfaction of the decretal sum and costs in the said civil suit, that the decretal sum and costs in the said civil suit is colossal, the same being Kshs. 18, 379,484/= and the applicant has no financial ability to raise the same that the applicant is in grave danger of being committed to civil jail in execution and satisfaction of the judgment and decree in the said civil suit that the main suit herein will be rendered nugatory and an academic exercise if the orders sought are not granted and that it is in the interest of justice that the orders sought in the instant Application be granted as prayed.
9. The applicant has stated in his said supporting Affidavit that on being served with the said Notice to Show Cause, he on 18 April 2023 notified the defendant/ respondent of the said Notice to Show Cause, and the same was duly received and stamped by the defendant/ respondent as can be seen on the Defendant's date stamp that appears on the said Notice to Show Cause- applicant's annexure "JKK 4".
10. The defendant/ respondent, having been notified and being aware of the judgment and decree in the said civil suit, the defendant/ respondent has failed and or refused to pay the decretal sum and costs in the said civil suit. This state of affairs has exposed the applicant to execution proceedings being taken out against him. The applicant is indeed in danger of being committed to civil jail in satisfaction of the decretal sum in the said civil suit as shown by the said Notice to Show Cause.
11. He cited the following cases.
 - a. [David Musili Muthui v Directline Insurance Limited & 2 others](#) [2019] eKLR (Nairobi HC(Milimani) Civil Suit No.88 of 2019.
 - b. [Joseph Mwangi Gitundu v Gateway Insurance Co Ltd](#) [2015] eKLR.
 - c. [Andrew Linge Mutua v Geminia Insurance Company Limited; Zipporah Mwende Mutua \(Interested Party\)](#) [2021] eKLR.
12. In the case of Andrew Linge Mutua v Geminia Insurance Company Limited and Zipporah Mwende Mutua (Interested Party) (supra), the court granted a stay of execution in circumstances similar to those obtained in the instant suit. The court anted an order staying execution in the primary suit pending the hearing and determination of the suit filed by the insured against the Insurer.



13. The Third-Party case is that,
14. The interested party instituted Nyahururu CMCC Civil Case No. 315 of 2019 on 15 November 2019, in which he sued the Plaintiff/Applicant, being the insured/beneficial/or registered owner of motor vehicle Registration No. KCK 959J (Nissan Matatu) and his employee and/or agent for their negligence that subsequently caused a self-involving accident on 25 January 2017, causing the plaintiff, who was a lawful passenger in the said vehicle and on the material day, to sustain serious injuries.
15. The pleadings documenting these facts were adequately served upon the Plaintiff/Applicant on 18 February 2022 and further acknowledged by him by appending his signature on all pleadings.
16. The Defendant/Respondent was served with a Statutory Notice notifying it of the proceedings in Nyahururu CMC Civil case No. 315 of 2019 against its insured.
17. The plaintiff/Applicant failed to enter appearance and file the requisite Statement of Defence to defend the suit. Consequently, the Interested Party's case proceeded, and a subsequent judgment was delivered on 4^{February} 2021 against the Plaintiff/Applicant.
18. As of 23 February 2023, the principal amount and interest had accrued to Kshs 18,379,483/= as evidenced by the Notice to Show Cause.
19. He submitted that the execution proceedings commenced, and the Interested party subsequently served the Notice to Show Cause dated 23 February 2023 upon the Plaintiff/Applicant, where the Applicant promised to liaise with the Advocates for the Interested Party to pay the decretal amount.
20. Unfortunately, while the Plaintiff/Applicant and the Defendant/Respondent continue to argue on who is to settle the decretal amount, the Interested Party remains bedridden and hospitalized from the date of the accident in 2017 to date.
21. It is undisputed that Section 4 of the *Insurance (Motor Vehicles Third Party Risks)* Chapter 405 Laws of Kenya, being the relevant applicable law herein, mandates that a policy of Insurance be taken regarding third-party risks before a vehicle is permitted to operate.
22. Section 5(b) Proviso (iv) of Chapter 405 Laws of Kenya as introduced into the statute by Act No. 10 of 2006 provides.

“ ... provided that a policy in this Section shall not be required to cover.

(iv) Liability of any sum in excess of three million Shillings arising from a claim by one person”.
23. The Plaintiff/Applicant should pay all the decretal amount per the judgment and decree in Nyahururu Chief Magistrate Court Civil Case No. 315 of 2019 against him. As noted above, section 5(b) Proviso (iv) of the Act limits what an insurance company can settle out of a claim by each person; the cap is Ksh. 3,000,000/=. Consequently, when judgment was pronounced in Nyahururu C.M.C. Civil Case No. 315 of 219, the Defendant was liable to settle the Interested Party's claim up to Kshs. 3,000,000/= as damages for the injuries and losses suffered.



24. However, a judicial officer has unfettered discretion to award damages above the Kshs. 3,000,000/= as illustrated in *APA Insurance Co. Ltd versus- Esther Kavindu Mwongo & another (sued as the legal representative of the Estate of Isaac Mutisya* [2019] eKLR where it was that

“ 15. Clearly, judicial officers have unfettered discretion to make awards over and above the limit of Kshs. 3,000,000/=

25. Case of *Martin Mutbike Ndamuki V Directline Assurance Co. Ltd & 2 others* [2021] eKLR where the court held that:

“ 113. I find, therefore, that the arrangement of premium payments and premium limits is a private arrangement that should be left between the Insured and the Insurer. The court and, equally, the second Respondent has no business interfering with a private contract between two persons. The court cannot purport to rewrite the contract between parties in a private contract.

114. It is trite that a court of law cannot purport to rewrite a contract voluntarily executed by parties. This was reiterated in the case of *J N N, (a Minor) M N M, suing as next friend V Naisula Holdings Limited t/a N School* [2018] eKLR, where this court held;

“5. It is not disputed that a binding contract exists signed by the school, the minor, and the parent. The terms are clear. The fees paid are not refundable upon expulsion, as in this case. I agree with the Respondent's counsel that a court of law cannot purport to rewrite a contract voluntarily executed by parties. It cannot be denied that the contract governs the relationship between the parties in this case. The Petitioner is now inviting this court to rewrite the contract.”

Issues Analysis And Determination

27. The court has gone through the material placed before the court, and what emerges is the issue as to whether the Applicant has demonstrated merit in the Application for a stay of execution of the lower court decree pending the hearing of the instant declaratory suit and orders as to costs.

28. The lower court judgment was successful against the interested party, who is an insured of the defendant/respondent in the instant suit.

29. The instant suit compels the Defendant to satisfy the decree issued in the trial court. None of the parties (Defendant or Interested Parties) herein has impugned the decree issued in Chief Magistrate Court Civil Case No. 315 of 2019 at Nyahururu.

30. The epicenter of the dispute has tilted to the arena of the plaintiff and Defendant on satisfaction of the decree in issue.

31. Under section 5(b) Proviso (iv) of *Cap 405* Laws of Kenya

Liability of Insurance is Limited to Ksh— 3 million for compensating one person in a claim.

32. I have not seen any contest that the same is not applicable in the circumstances of this case. Assuming the Defendant will pay out/or be held liable to pay the said amount in the Instant suit, what is the plaintiff saying about the balance of over Ksh. Fifteen million above the liability of the Insurance



(Defendant), is the plaintiff saying he is not liable to pay the same? He has not challenged the award by the trial court even if the stay was to be obtained in the Instant case. It would have applied to the extent of the Defendant's liability.

33. The plaintiff offers no option for handling the amount outside the insurance liability.
34. It is not for this court's duty to advise the parties. Every case is treated according to its facts and applicable law.
35. Even if the stay is granted as prayed and the court determines, the Insurance is to pay the upper limit of Ksh. Three (3) Million Prescribed by the law, what would the plaintiff/Applicant do with the balance outstanding?
36. The court has read through pleadings, Affidavits, and the annexures, which on the interested party's side demonstrate a pathetic case of a party in a destitute state being tossed between Insurance and the Plaintiff who ought to have discharged their legal obligations.
 - i. That being so, the court finds no merit in the Application, and the same is dismissed with costs to the interested party.
 - ii. The Advocate/plaintiff can expedite the hearing of the suit to recover what the court will decree against the defendants.

DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 15TH DAY OF DECEMBER 2023

C KARIUKI

JUDGE

