



**Maina & another v Invesco Assurance Compnay Limited; Monyoncho (Interested Party)
(Civil Suit E014 of 2021) [2022] KEHC 14819 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT E014 OF 2021
TM MATHEKA, J
OCTOBER 27, 2022**

BETWEEN

JOSEPH MAINA 1ST APPLICANT

DAVID KIPRUTO TENAI 2ND APPLICANT

AND

INVESCO ASSURANCE COMPNAY LIMITED RESPONDENT

AND

CHRISTOPHER MOKUA MONYONCHO INTERESTED PARTY

RULING

1. The 1st applicant is the registered owner of the motor vehicle registration number KCF 372 C. He claims that he insured it with the respondent vide policy number 050/0804/1/028540/2015/11 which commenced on November 24, 2016 and expired on December 23, 2016 covering such persons or class of persons as specified in the policy in respect of injury or damages arising out of use of the said motor vehicle.
2. That motor vehicle was involved in a road accident on or about December 4, 2014 along Eldoret-Nakuru Road and as a result of the accident, Christopher Mokuia Monyoncho, the interested party herein, sustained body injuries. He filed suit seeking compensation for special and general damages in Molo CMCC No 109 of 2017 *Christopher Mokuia Monyoncho vs Joseph Maina & David Kipruto Tenai*. On July 22, 2019 judgement was entered in favour of the interested party for Kshs 1,512,550 plus cost and interest.
3. It is his position that he notified the respondent but it failed and or neglected to take any action in the matter and as such the aforementioned matter proceeded to its logical conclusion without its participation and now he faces the risk of execution against him.



4. On May 29, 2021, he filed notice of motion under article 40,48,50(1) and 159 of the [Constitution of Kenya](#), Sections 1A,1B,63E and 3A of the [Civil Procedure Act](#), cap 21 of the laws of Kenya, Order 22 Rule 22 and Order 51 Rule 18 of the [Civil Procedure Rules,2010](#), seeking *inter alia* that:-
 1. Spent
 2. The court be pleased to issue a stay of execution of Judgement and decree and any further proceedings in Molo CMCC No 109 of 2017 *Christopher Mokuu Monyoncho vs Joseph Maina & David Kipruto Tenai* pending the hearing and determination of this suit.
 3. Costs for this application be provided for.
5. The grounds for the application are stated on the face of the application and his affidavit sworn on May 31, 2021 on his behalf and on behalf of David Kipruto Tenai, 2nd applicant.
6. It is the applicant's contention that he and the respondent had a contract within which the respondent was to pay compensation to the interested party. That since the respondent has failed to do so he has since filed a declaratory suit against the respondent and if orders sought are not granted the suit shall be rendered nugatory.
7. The interested party Christopher Mokuu Monyoncho opposed the application vide replying affidavit sworn on June 21, 2021.
8. He deposed that he is the decree holder in Molo CMCC No 109 of 2017 *Christopher Mokuu Monyoncho vs Joseph Maina and David Kipruto Tenai*; that the matter in the lower court proceeded *ex parte* and on July 22, 2019 judgment was entered in his favour for Kshs 1,512,550/=; that the applicants then moved the lower court by Notice of Motion dated October 29, 2019 seeking to set aside the *ex parte* proceedings and judgment but the Application was found to be unmeritorious and was dismissed.
9. He contended that the Applicant had not appealed against the decision or taken any further action until he commenced execution proceedings against him.
10. It is his position that he is not bound by the contract between the Applicant and the Respondent. That the respondent does not deserve the orders sought as he has not offered any security to demonstrate any good will. In any event the declaratory suit against the respondent is an afterthought and in bad faith as there are no reasons advanced by the applicant for the delay in instituting the same from the time the judgment was delivered.
11. The orders sought if granted greatly prejudice him as the realization of the fruits of his judgment will be unduly prolonged by litigation he is not privy to.
12. The respondent despite due service never filed any response to the Application.
13. The application was canvassed through written submissions.

Applicant's Submissions

14. The applicants filed their submissions on July 29, 2021.
15. They distilled three issues for determination. Namely:
 1. Whether there existed a contract between the applicant and the respondent.
 2. Whether the respondent breached the contract.



3. Whether it is appropriate to grant the orders for stay of execution pending the hearing and determination of the declaratory suit.
16. On the first issue, the Applicants submitted that he took the insurance policy from the respondent under policy number 050/0804/1/028540/2015/11 for his motor vehicle registration number KCF 372 C commencing on November 24, 2016 and expiring on December 23, 2016 and that the interested party was involved in an accident on or about December 4, 2016 when the said policy was still in force and as such the Respondent under section 10(1) of the *Insurance Motor Vehicle third parties risks Act* Cap 405, is bound to indemnify him in respect of liability to third parties intended to be protected under section 5(b) of the Act for injuries occasioned to him in the use of the Motor Vehicle on the road.
17. On the second issue, the applicants submitted that the respondent has breached his contractual obligation by failing to satisfy the decree since it is statutorily bound to indemnify all 3rd party losses that occur during the subsistence of the policy.
18. Regarding the third issue, the applicants submitted that the purpose of the above provisions of *Insurance (Motor Vehicle Third Party Risks) Act*, Cap 405 is to ensure that a third party injured by an insured motor vehicle gets compensated for his suffering, loss or inconvenience in the event the owner or driver of the accident motor vehicle is unable to settle the claims. For this proposition reliance was placed on the cases of *Isaack Wakoli vs Xplico Insurance Company* [2021] eKLR cited with approval in the case of *New Great Insurance Co of India Ltd vs Lilian Everlyne Cross & Another* (1966) EA, 90 & *Charles Makenzi Wambua vs Africa Merchant Assurance Co Ltd & another* [2014] eKLR.

The Interested Party's Submissions

19. The interested party filed his Submissions on July 19, 2021.
20. He submitted that it is an established principle of law and requirements of Order 22 Rule 22 that for orders of stay of execution of a decree to issue, the court must satisfy itself of two things namely; that there is sufficient cause shown & that the Applicant is capable of offering security or adhering to other conditions that may be imposed by the court.
21. The interested party submitted that the applicant has not shown sufficient cause for grant of the orders sought because;
 1. There is no certificate of insurance to prove existing policy as averred in paragraph 4 of the Supporting Affidavit
 2. The applicant has recourse in law under the principle of indemnity which allows him to be compensated and restored to its initial financial position should he successfully prove his case against the respondent and that that right of action does not bar the interested party from executing the decree issued in his favour against the applicant directly. For this proposition he cited the case of *Peter Kilonzo Kioko Vs Monarch Insurance Co Ltd; Kisakwa Ndolo King'oku (Sued As Legal Representative Of The Estate Of Mwanja Kisakwa – Deceased (Interested Party)* [2021] eKLR where the court held that;
 - “ 31. However, whereas an insured may well be entitled to seek a declaration that its insurer is entitled to settle the claims covered under the insurance policy, that statutory right of action does not bar a person who is injured from executing the decree issued in his favour against the insured directly”



3. The Applicant has not demonstrated that he is not a person of means and therefore unable to make good the decretal sum
 4. This court under sections 1A & 1B of the *Civil Procedure Act* the court has overriding objective to have disputes resolved in a just, expeditious, proportionate and affordable manner and therefore it will be unfair to keep him waiting as the applicant and the respondent resolve issues which he is not privy to.
22. On security, the interested party submitted that the issue of costs was well addressed by the court in the case of *Arun C Sharma vs Ashana Raukundalia t/a Rairundalia & Co Advocates & 2 others* [2014] eKLR, where the court stated:

“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.”

23. He thus submitted that the Applicants have not offered any security to be considered by this Honourable Court and as such they are undeserving of the orders sought.

Issues for Determination

24. The only issue that arises for determination is whether this court should grant stay of execution of judgement, decree and any further proceedings in Molo CMCC No 109 Of 2017 Christopher Mokuu Monyoncho vs Joseph Maina & David Kipruto Tenai.

Analysis & Determination

25. Order 22 rule 22 provides:

“22. When court may stay execution [Order 22, rule 22.]

- (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.
- (2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.



(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.”

25. The applicant has not established prima facie that the respondent was the insurer of the said motor vehicle as no certificate of insurance has been annexed to the Applicants’ Supporting affidavit but the police abstract that was issued to the interested party after the accident confirms that the insurer of the Motor vehicle in question is the respondent herein, so that settles the issue. However as to the contractual agreement that would depend on the contract of insurance and that would be an issue for determination in the suit the applicant intends to prosecute.
26. However as correctly submitted and pleaded by the interested party he is not a party to the contractual arrangement between the applicant and the respondent and the orders of stay if granted will affect his interest and the enjoyment of his of the fruits of his labour.
27. While the 1st Applicant as an insured is entitled to seek a declaration that it’s insurer(the respondent herein) is entitled to settle the claims covered under the insurance policy, that statutory right of action does not however bar a person who is injured from executing the decree issued in his favour against the insured directly. In *Dolk Limited vs Invesco Assurance Company Limited & 5 Others* [2018] eKLR and that of *Muthuri Ntara & Another vs Francis Mworio Igweta* [2016] eKLR the court stated that despite the fact that section 10 (1) of the *Insurance (Motor Vehicle Third Party Risks) Act* provides for the mandatory satisfaction of a judgement of any sum payable to its insured under a policy, the section does not provide for a stay of execution against the insured by the third party and further that the statutory right to seek a declaration against the insurer by the insured does not and cannot bar a decree holder from executing his/her decree against the judgment debtor who is the insured.
28. The applicant has not appealed against the judgment delivered in the Molo neither has he challenged by way of review. The 1st Applicant has not also demonstrated that he lacks means of settling the suit herein neither has he offered any security. It will be unfair to keep the interested party waiting longer in order to enjoy the fruits of his judgment.
29. *Jenipher Anyango Oloo vs Buzeki Enterprises Limited & another* [2021] eKLR dismissed a similar application on grounds that filing of a declaratory suit is no bar to execution of decree by a genuine decree holder. The court stated as follows:-
- “In the circumstances, it is my view that the trial court erred in staying execution of decree issued in favour of the appellant against the 1st Respondent insured, pending the hearing and determination of the declaratory suit. This is because the application dated December 20, 2018 was firstly, res judicata the application dated September 24, 2018 filed by the 1st respondent in Siaya PMCC 75 of 2016 and secondly, because the filing of a declaratory suit is no bar to execution of decree by a genuine decree holder...”
30. More importantly the proceedings in the lower court were undefended. Efforts to set them aside were denied by the court and the applicant did not challenge that Ruling. The judgment against him was passed in 2019. This application was filed on June 3, 2021. The applicant retains the right to seek compensation from the respondent.
31. The applicant has also not provided any security as required by order 22 of the *Civil Procedure Rules 2010*.



32. Clearly this application is not merited and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF OCTOBER, 2022.

MUMBUA T MATHEKA

JUDGE

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M/S Alwang'a Company Advocates

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Mr. Lemayan Present for IP

