



**Omar Athuman Mohamed t/a Paint Works & General Maintenance
v Monarch Insurance Co. Ltd; Kaingu (Interested Party) (Civil Suit
115 of 2021) [2022] KEHC 14284 (KLR) (24 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 115 OF 2021
OA SEWE, J
OCTOBER 24, 2022**

BETWEEN

**OMAR ATHUMAN MOHAMED T/A PAINT WORKS & GENERAL
MAINTENANCE PLAINTIFF**

AND

MONARCH INSURANCE CO. LTD DEFENDANT

AND

JUMWA KAINGU INTERESTED PARTY

RULING

1.

- (1) The Notice of Motion dated November 17, 2021 was brought by the plaintiff herein under Article 159 of the [Constitution of Kenya](#), Sections 1A, 1B & 3A of the [Civil Procedure Act](#), Chapter 21 of the Laws of Kenya as well as Order 22 Rule 22 of the [Civil Procedure Rules](#) and all other enabling provisions of the law, for the following orders:
 - (a) Spent
 - (b) Spent
 - (c) That pending the hearing and determination of this suit, the Court be pleased to issue an order of stay of execution of the judgment and decree passed in Mombasa SRMCC No 1917 of 2018: Jumwa Kaingu v Omar Athumani Mohamed T/A Pain Work General Maintenance;
 - (d) That the costs of the application be borne by the defendant.



2. The application was premised on the grounds that, by a public liability policy of insurance No MSA/0502/000016/2016, the defendant, in consideration of premiums then paid by the plaintiff, agreed to absolve, indemnify and/or hold the plaintiff indemnified from any/all actions, proceedings, procedures, processes, liability, claims, damages, costs and expenses in relation to, arising out of the nature of business or occupation of the plaintiff.
3. It was further the contention of the plaintiff that, on or about February 28, 2017, the plaintiff was in the course of his business and occupation as defined in the policy of insurance, which included demolishing a building within Mvita Area when a wall fell and hit the interested party, Jumwa Kaingu. As a consequence, and by way of a Plaintiff filed on 18th September 2018 in Mombasa SRMCC No 1917 of 2018: Jumwa Kaingu v Omar Athumani Mohamed T/A Paintworks & General Maintenance, the interested party sued the plaintiff seeking general damages, special damages, future medical expenses, loss of earnings and costs of the suit.
4. The suit was heard and determined; whereupon judgment was entered in favour of the interested party in the sum of Kshs 1,508,685/= inclusive of costs and interest. The plaintiff has partially settled the decretal sum to the tune of Kshs 900,000/= and now seeks that the balance of Kshs 606,685/= be settled by the defendant pursuant to the policy of insurance. He accordingly filed this declaratory suit to enforce his rights under the policy of insurance, contending that he had legitimate expectation that the defendant would fully indemnify and/or absolve him from the interested party's claim.
5. The plaintiff further averred that, in the meantime, the interested party has proceeded to commence execution; and that he had been summoned to appear before the lower court on November 18, 2021 to show cause why he should not be committed to civil jail for failing to settle the remainder of the decretal sum. He is consequently apprehensive that, if the order of stay of execution is not granted as prayed, he stands to suffer grave, unjustified and irreversible prejudice as he is at the risk of imprisonment.
6. The aforementioned grounds were deposed to in the plaintiff's affidavit, sworn on November 17, 2021 to which he annexed supporting documents, including a copies of the pleadings filed before the lower court of one of the cheques issued to the defendant in settlement of the premiums due on the subject policy.
7. The application was duly served and whereas there appears to be no response thereto by the defendant, the interested party filed a Replying Affidavit on January 10, 2022. He reiterated his position that he has a valid decree which has only been partially paid and therefore that the application is devoid of any merit. At paragraph 25 of the Replying Affidavit the interested party set out his grounds for that posturing; one of them being that the defendant indeed made a payment of Kshs 902,000/= on behalf of the plaintiff after the plaintiff's appeal was dismissed. According to him, this was an indication that the defendant recognized the judgment and its responsibility to comply with it. Thus, he averred that any dispute between the plaintiff and the defendant should not in any way hamper his quest to recover the outstanding sums due under his decree.
8. Directions were given herein on December 6, 2021 that the application be urged by way of written submissions; to which end, counsel for the plaintiff filed written submissions on February 17, 2022. The plaintiff was then given an opportunity on March 22, 2022 to highlight his submissions; to which counsel for the interested party made an oral response. Thus, Ms Azei, learned counsel for the plaintiff, proposed only one issue for determination, premised on the stance that the application was brought under Order 22 Rule 22 of the *Civil Procedure Rules*; namely, whether the plaintiff is entitled to stay of execution pending the hearing and determination of this suit.



9. Ms Azei relied on *Butt v Rent Restriction Tribunal* [1982] KLR 417 as followed in *Eston Mwirigi Ndege & Another v Joseph Macharia Kawira* [2018] eKLR and urged the Court to find that the plaintiff has demonstrated sufficient grounds to warrant the grant of the stay order prayed for. She particularly highlighted the point that, having paid part of the decree, there is no justification for the defendant to decline settlement of the balance of the decree; granted that the subject cover entitled the plaintiff to indemnity up to a limit of Kshs 3,000,000/=.
10. Lastly, Ms. Azei urged the Court to rely on *Charles Makenzi Wambua v Africa Merchant Assurance Co Ltd & Another* [2014] eKLR and *Martin Kamakya v Resolution Insurance Co Ltd; Peter Ngumbi (Interested Party)* [2021] eKLR in support of the proposition that the insurer is bound by law to settle the subject claim; and therefore to allow the interested party to proceed with execution would create a state of affairs that will irreparably affect the plaintiff. According to her, the interested party stands to suffer no prejudice if the orders sought are granted.
11. I have given due consideration to the application and note that, though expressed to have been filed under Order 22 Rule 22 of the *Civil Procedure Rules*, that provision is inapplicable, for it cannot, strictly speaking be said that the decree of the lower court has been sent to this Court for purposes of execution. Moreover, this is not an appeal for purposes of which Order 42 Rule 6 of the *Civil Procedure Rules* would come into play. It is a declaratory suit involving an insured and his insurer; and is therefore premised on their contract of insurance. It is therefore my considered view that perhaps the more relevant procedural provisions would be Order 40 Rule 1 of the *Civil Procedure Rules*, notwithstanding that it is the plaintiff's liberty and not property that is under threat of curtailment at the moment. The provision recognizes that:

“Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.” (emphasis added)
12. In addition, Section 63(e) of the *Civil Procedure Act* gives the Court the powers to make “...such other interlocutory orders as may appear to the court to be just and convenient.” Thus, looking at the application from the prism of Section 63(e) of the *Civil Procedure Act* and Order 40 Rule 1 of the *Civil Procedure Rules*, the issue for determination is whether sufficient cause has been shown for the issuance of an order of stay execution/proceedings as sought by the plaintiff.
13. For the general purposes of Order 40 Rule 1, it was held thus in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358:

“The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”



14. As to what amounts to a *prima facie* case, the Court of Appeal, in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 held that:

“A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

15. At this point, the Court need not examine the merits of the plaintiff’s case too closely; but it must, nevertheless, be satisfied that there is a right as claimed by the plaintiff which has been infringed by the defendant. The Court of Appeal made this point in *Nguruman Limited v Jan Bonde Nielsen & 2 Others*, Civil Appeal No 77 of 2012, when it held that:

“We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

16. The plaintiff has demonstrated that he took out a policy with the defendant pursuant to which the defendant was obliged to indemnify it against certain perils. A copy of an Endorsement dated August 8, 2016 (Annexure 1 to the Supporting Affidavit) confirms that the defendant furnished the plaintiff with Policy No MSA/0502/000016/2016 with a public liability limit of Kshs 3,000,000/=. It is also not in dispute that pursuant to that policy the defendant has made partial payment to the interested party to the tune of Kshs 902,000/=. As the defendant is yet to respond to the suit, it is not clear why it has declined to settle the balance of the interested party’s claim of Kshs 606,685/=. I am therefore convinced that the plaintiff has demonstrated a *prima facie* case worth calling upon the defendant to respond to from the standpoint of Section 76(1) of the *Insurance Act*, Chapter 487 of the Laws of Kenya, which stipulates that:

The holder of a policy of insurance issued by an insurer in respect of insurance business carried on by him in Kenya on or after the appointed date shall have the right, notwithstanding any agreement to the contrary contained in the policy of insurance or in any agreement relating thereto, to receive payment of any sum secured thereby in Kenya and to sue for any relief in respect of the policy in Kenya; and if action on the policy is instituted in Kenya, any question of law in connection with the policy or proceedings shall be heard and determined according to the Law in force in Kenya.

17. There being no response to the instant application by the defendant, I am satisfied that the plaintiff has a genuine cause for complaint against the defendant. Thus, the plaintiff has demonstrated, on a *prima facie* basis, that “...there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
18. In addition to the foregoing, the plaintiff has demonstrated that the process of execution has been initiated by the interested party and a Notice to Show Cause given as to why he should not be imprisoned over his failure to satisfy the subject decree. Hence, upon balancing the interests of the



plaintiff, the defendant and the interested party, I am convinced that no inconvenience or prejudice will be visited on either the defendant or the interested party for which costs and interest would not be adequate recompense. On the other hand, the plaintiff risks suffering immense prejudice should execution be proceeded with in the manner proposed by the interested party. It is also manifest that the application was brought without undue delay, granted that it was filed on November 17, 2021 upon receipt by the plaintiff of the Notice to Show Cause.

19. The upshot is that the application dated November 17, 2021 is merited and is allowed as prayed and orders granted as hereunder:
- (a) That pending the hearing and determination of this suit, an order of stay of execution be and is hereby issued in respect of the judgment and decree passed in Mombasa SRMCC No 1917 of 2018: Jumwa Kaingu v Omar Athumani Mohamed T/A Pain Work General Maintenance;
 - (b) The costs of the application be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF OCTOBER 2022.

OLGA SEWE

JUDGE

