



REPUBLIC OF KENYA



**KENYA LAW**  
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**Odhiambo v Monarch Insurance Co Ltd; Senge & another (Interested Parties) (Civil Case E002 of 2022) [2022] KEHC 15610 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15610 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CIVIL CASE E002 OF 2022  
RE ABURILI, J  
NOVEMBER 23, 2022**

**BETWEEN**

**STEPHEN AMOLLO ODHIAMBO ..... PLAINTIFF**

**AND**

**MONARCH INSURANCE CO LTD ..... DEFENDANT**

**AND**

**ZABLON OCHIENG SENGE ..... INTERESTED PARTY**

**CAROLINE AOKO OCHIENG ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. The plaintiff is Stephen Amollo Odhiambo. Vide an application dated August 25, 2022, he seeks from this court the following orders:
  - a. Spent
  - b. Spent
  - c. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order to stay the execution of the Decree issued in Bondo Chief Magistrate's Court Civil Suit Number 48 of 2017 (Zablon Ochieng Senge & Another v Amollo Stephen).
  - d. That costs of this Application be provided for.
  - e. That this Honourable Court be pleased to make such and other further orders as it may deem just and fit in the circumstances of the case.



2. It is the plaintiff's case that on or about the August 19, 2015, he was involved in an accident along the Bondo – Misori road whilst driving his motor vehicle registration number KAT 685F, which motor vehicle was insured by the defendant herein under policy number 00700/xxxxxxx/xxxx.
3. The plaintiff averred that as a result of the accident, one Stephen A Odhiambo sustained fatal injuries and as a result, the deceased's legal representatives, the interested parties herein instituted suit for compensation in Bondo Chief Magistrate's Court Civil Suit Number 48 of 2017 (Zablon Ochieng Senge & Another v Amollo Stephen) and successfully obtained judgement against the plaintiff to the tune of Kshs 1,331,000.00 which due to accrual of interest stood at Kshs 1,980,967 as at July 22, 2022.
4. It is the plaintiff's case that despite having a valid insurance policy with the defendant at the time of the accident, the defendant has neglected, failed and/or declined to settle the decretal sum in Bondo Chief Magistrate's Court Civil Suit Number 48 of 2017 (Zablon Ochieng Senge & Another v Amollo Stephen).
5. The plaintiff thus avers that unless the execution is stayed pending determination of this suit, the interested parties shall proceed to execute the decree against the plaintiff which shall be to the plaintiff's detriment.
6. In response, the interested parties opposed the application vide a replying affidavit sworn by Geoffrey O Okoth on the October 14, 2022.
7. It is the interested parties case that they obtained judgement against the plaintiff in Bondo Chief Magistrate's Court Civil Suit Number 48 of 2017 (Zablon Ochieng Senge & Another v Amollo Stephen) to the tune of Kshs 1,584,220 compromising of general damages as well as costs of which the plaintiff has only settled Kshs 396,080.
8. It was deposed on behalf of the interested parties that they ought to have not been included in the instant proceedings as they are not a party to the contract between the plaintiff herein and the defendant.
9. The interested party further avers that the instant application lacks merit, is bad in law and fatally defective as the plaintiff has not filed any memorandum of appeal from the decision in Bondo PMCC No 48 of 2017 and thus stay of execution cannot be granted until the plaintiff meets the condition precedent for grant of stay of execution as provided in Order 42 Rule 6 (1) of the [Civil Procedure Rules](#).
10. It is deposed that as lawful decree holders they were entitled to enjoy the fruits of litigation and that staying of execution of the same would infringe on the interested parties' rights.
11. The parties made oral submissions in disposal of the matter.

### **The Plaintiff's Oral Submissions**

12. Mr Shisanya for the plaintiff submitted that the defendant being his insurer was duty bound to satisfy the decree passed against the plaintiff in Bondo PMCC 48/2017. He submitted that the decretal amount had increased to over Kshs 1.5 million.
13. Mr Shisanya submitted that the plaintiff had a valid insurance policy. He further submitted that Kshs 396,080 had been paid to the interested parties by the defendant signalling that the defendant admitted liability. He further submitted that the interested parties ought to go after the defendant and not the plaintiff.
14. Mr Shanyisa further submitted that the replying affidavit deposed on behalf of the interested parties had contested issues yet it was sworn by the advocates. He submitted that the issue before court was not



faulting judgement or decree of the lower court but rather who bears the burden to settle the decretal sum.

15. It was submitted on behalf of the plaintiff that the plaintiff stood to suffer double jeopardy if execution was allowed to proceed as he had already paid insurance money and the defendant had already settled part of the decretal sum hence liability was settled.
16. Mr Shanyisa further deposed that the plaintiff sought stay of execution to prevent them from being prejudiced. Reliance was placed on the *Giella v Cassman Brown* case.

#### **The Interested Parties' Oral Submissions**

17. Mr Osewe submitted that the interested parties were not party to the contract between the plaintiff and the defendant as they were decree holders in a suit against the plaintiff who was insured by the defendant.
18. It was submitted that the interested parties were entitled to recover their judgement sum from the plaintiff as they cannot execute against the defendant whereas the plaintiff had recourse against the defendant. Mr Osewe further submitted that the instant application was misconceived, bad in law and ought to be dismissed.

#### **The Plaintiff's Rejoinder Oral Submissions**

19. Mr Shisanya submitted that the interested parties as decree holders had a stake in the instant case. He submitted that if stay is not granted the claim would be dispensed with yet the plaintiff was insured by the defendant.

#### **Analysis and Determination**

20. I have considered the application, the affidavits both in support of and in opposition to the application herein as well as the submissions filed.
21. In this case it is not disputed that the Plaintiff is the judgement debtor in the primary suit where the Interested Party is the decree holder. The plaintiff contends that the Defendant was the insurer of the vehicle which caused the accident the subject matter of that primary suit and that contention is not challenged by the Defendant herein. In this suit, the plaintiff seeks to compel the Defendant to meet its obligations under the contract of insurance by satisfying the said decree. In the meantime, he seeks to have the execution and proceedings in the primary suit stayed.
22. On the other hand, the interested parties submitted that they were not supposed to be enjoined in the instant application as they were not privy to the contract between the plaintiff and the defendant. There is no doubt that the said order of stay sought by the plaintiff if granted will affect the interests of the interested parties herein.
23. The Supreme Court of Kenya in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others* (2014) eKLR held as follows with regard to an interested party:

“Suffice it so say that while an interested party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom. Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made either way. Such a



person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause." (emphasis added).

24. Further, in *Gateway Insurance Co Ltd v Moses Jaika Luvai* (2008) eKLR, Ibrahim, J (as he then was) stated that:

“The plaintiffs in the suits which the insurer seeks to avoid liability under Section 10(1) by way of declaratory suit must be notified of the institution of the declaration suit and after which the said Plaintiffs are entitled to be made parties to the Insurer’s suit if they think fit. The provision is mandatory and the Court has no discretion on the matter. The discretion and election lies with the Plaintiffs who have sued the insured for damages and losses arising from motor accidents. It is a right which none of the parties or the Court can take away.”

25. Based on the said decisions I am satisfied that the Interested Party is properly joined to these proceedings.

26. The plaintiff seeks to stay execution of the decree in the primary suit pending the determination of this suit. 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 their favour against the insured directly.

27. The plaintiff is in effect seeking that the Defendants pay the interested parties the sum due to them from the plaintiff. It is asserted that unless some measure of protection is given to the plaintiff, his suit as presently framed may well be an academic exercise. To that limited extent I agree with the reasoning in the case of *Charles Makenzi Wambua v Africa Merchant Assurance Co Ltd & Another* [2014] eKLR where the court stated as follows:

“Secondly, that unless such stay is granted, the intended suit shall be rendered nugatory. In my analysis, I have found that if stay is not granted, the court will be assisting the defendant to avoid a contract whose terms are dictated by statute, to compensate the interested parties herein then revert to the plaintiff to recoup any extra sums that they may have paid to third(interested) parties...I must also consider whether granting the stay sought will in any way prejudice the interested parties who have opposed this application. The interested parties being persons covered under Section 4 (1) of the Act-Cap 405 Laws of Kenya, the liability of the defendant is preserved as against them and they could as well, sue the defendant by way of a declaratory suit to recover the sums due as per the decrees in their favor...However, the plaintiff has opted to carry that burden on their behalf. If the suit herein is determined in favor of the plaintiff, then the interested parties stand to benefit directly. They need not file any other declaratory suit against the defendant. For that reason therefore, time and resources, will also be saved for the interested parties. Therefore, no prejudice will be caused to them.”

28. It may be argued that in these circumstances, justice would be done to all the parties if there was a stay of proceedings for a short period to enable the plaintiff prosecute his case.

29. I must however state that the primary obligation of settling the decree falls squarely on the plaintiff and in the event that the Defendant as his insurer fails to satisfy the decree, the plaintiff will still be called upon to satisfy the same. In other words, the mere fact that the Defendant is bound both contractually and statutorily to satisfy the decree does not absolve the plaintiff from meeting his obligations under the tort of negligence.



30. In addition, nothing prevents the plaintiff from settling the decretal sum and then enforcing that same decree against the Defendant for reimbursement. That in my view will not render this suit nugatory as the plaintiff can, upon settling the decree, amend his plaint and seek for reimbursement of the monies paid to the interested parties. Further, it is admitted by the plaintiff that the defendant had already started settling the decretal sum to the tune of Kshs 396,080.

31. This is in line with section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* which places a duty on an insurer to settle decretal amount as follows:

“ 10. Duty of insurer to satisfy judgments against persons insured-

(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in Section 5 (b) prescribed in respect thereof in the Schedule.”

32. Thus, upon entry of judgment in such accident claims where the Defendant was insured, the above provisions require the insurer to settle the decretal amount as awarded and in accordance with the provisions of the Act. It is however not always the case that the insurers willingly settle the claim and this necessitates the filing of a declaratory suit to compel the insurer to settle the decree. Ordinarily, such declaratory suits are filed by the Defendant and/or Judgment Debtor in the primary suit.

33. In *Dolk Limited v Invesco Assurance Company Limited & 5 Others* [2018] eKLR and in *Muthuri Ntara & Another v Francis Mworira Igweta* [2016] eKLR the court in both instances 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 judgement debtor who is the insured.

34. In the circumstances, I find that the instant application is not merited. I dismiss it with costs to the interested parties.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 23RD DAY OF NOVEMBER, 2022**

**R.E. ABURILI**

**JUDGE**

