



Visions in Christ Church Suing through its Representative (Christopher Kahindu Njagu (Chairman), David Kairu Kinuthia (Secretary) & Samuel Kamau Thagana(Treasurer) v Kenya Alliance Insurance Company Limited & 4 others (Miscellaneous Application E402 of 2021) [2021] KEHC 420 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)

Neutral citation: [2021] KEHC 420 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E402 OF 2021**

**WA OKWANY, J
DECEMBER 16, 2021**

BETWEEN

**VISIONS IN CHRIST CHURCH SUING THROUGH ITS
REPRESENTATIVE (CHRISTOPHER KAHINDU NJAGU (CHAIRMAN),
DAVID KAIRU KINUTHIA (SECRETARY) & SAMUEL KAMAU
THAGANA(TREASURER) APPLICANT**

AND

**KENYA ALLIANCE INSURANCE COMPANY LIMITED 1ST RESPONDENT
ISAAC MWANGI KAMAU & DAVID KAMAU MWANGI (SUING AS LEGAL
REPRESENTATIVES OF THE ESTATE OF MARIANA WANJIRU MWANGI
DECEASED) 2ND RESPONDENT
JOHN GICHUKI KAMUHIA & ROBERT KAMUHIA GICHUKI (SUING AS
LEGAL REPRESENTATIVES OF THE ESTATE OF MARY WANGUI GICHUHI
DECEASED) 3RD RESPONDENT
PETER MBURU NJOROGI & JOHN NGUGI MBUTU SUING AS LEGAL
REPRESENTATIVES OF THE ESTATE OF ESTER WANJIRU NGUGI
DECEASED 4TH RESPONDENT
AYUB MUCHUNGU MACHARIA SUING AS LEGAL REPRESENTATIVES OF
THE ESTATE OF MARIANA WANJIRU MWANGI 5TH RESPONDENT**



RULING

1. This ruling is in respect to the application dated 21st May 2021 wherein the applicant seeks the following orders: -
 1. Spent.
 2. Spent.
 3. THAT, an order of stay of execution and/or further execution against the judgment/decreed dated and delivered on 25th January 2019 in *ENGINEER SPMCC NO. 123 OF 2017*, SPMCC NO 124 OF 2017, SPMCC NoO.125 of 2017 and SPMCC NO. 126 OF 2017 be issued pending the hearing and determination of this declaratory suit filed in MILIMANI CMCC E4028 OF 2020.
 4. THAT the costs of this application be provided for.
2. The application is brought under Article 159(2) (d) of the [Constitution](#), Section 1A,1B and 3A of the [Civil Procedure Act](#) and Order 51 Rule 1 of the [Civil Procedure Rules](#).
3. The application is supported by the affidavit sworn by Christopher Kahindu Njagu (Chairman) and is based on the following grounds: -
 - a. The Hon G.N Opkasi (SRM) delivered judgments awarding the 2nd,3rd,4th and 5th respondents herein damages for an accident that occurred on 25th November 2014 together with costs of the suit.
 - b. The respondents herein failed to take up the matters on its behalf hence leaving it exposed, it was reluctantly forced to look for an advocate to take up the claim on its behalf and handle the matters to their very conclusion.
 - c. The applicant vides various letters to the 1st respondent attempted to have it deal with the matter through mediation, however it failed to acknowledge or respond to the correspondences.
 - d. The applicant filed a declaratory suit at the Milimani commercial court being CMSS E4028 OF 2020 seeking declaratory orders and costs of the suit.
 - e. The matter is still pending pretrial and is yet to proceed to hearing
 - f. If the request of a stay of execution is not granted, substantial loss may result to the applicant since the plaintiff in ENGINEER SPMCC NO 125 OF 2017 has already commenced execution.
 - g. The suit being MILIMANI MCCC E4028 OF 2020 has a reasonable chance of success and if execution is carried out it will render the same nugatory.
 - h. There has been no delay in bringing this application.
 - i. The other plaintiffs are likely to execute the decree herein at any time



4. The respondents opposed the application through the Grounds of Opposition dated 3rd May 2021 wherein they state that this court lacks the jurisdiction to issue the orders sought as it is not the court to which the decree had been sent for execution and neither is it the court that issued the decree. They state that there is no pending suit between the decree holder and the judgment debtor and that no appeal has been preferred against the impugned ruling so as to justify the filing of the application. They contend that the court has not been approached in its supervisory jurisdiction under the judicial review process. The respondents aver that the application is fatally defective as it seeks final orders in an interlocutory application.
5. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the applicant is entitled to the orders for stay of execution of the judgment/decrees delivered on 25th January 2019 in *ENGINEER SPMCC NO. 123 OF 2017*, SPMCC NO. 124 OF 2017, SPMCC NO. 125 OF 2017 and SPMCC NO. 126 OF 2017 pending the hearing and determination of this declaratory suit.
6. The applicants' claim is that the court delivered a judgment where it awarded the 2nd, 3rd, 4th and 5th respondents damages and costs arising from an accident that occurred on 25th November 2014. The applicants then filed a declaratory suit being MILIMANI CMCC E4028 OF 2020 and now seek to invoke this court's exercise of its supervisory jurisdiction to grant the orders sought.
7. The respondents on the other hand opposed the application while arguing that the court lacks the jurisdiction to entertain the matter. According to the respondents, this court did not issue the decree and is also not the court that the decree had been sent for execution. The respondents further faulted the applicants for commencing the suit through an application and for seeking final orders in an interlocutory application.
8. Order 22 Rule 22 of the Civil Procedure Rules stipulates that: -
 - “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 request such security from, or impose such conditions upon the judgment-debtor as it thinks fit.”
9. Order 42 Rule 6 of the Civil Procedure Rules, on the other hand, provides as follows: -
 - 6(2) No order for stay of execution shall be made under subrule (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.

10. The above cited provisions indicate that the power to grant orders for stay of execution is at the discretion of the court that issued the decree or any Court having appellate jurisdiction in respect of the decree or the court to which the decree has been sent for execution. In the present case, I note that the applicants have not preferred any appeal in respect to ENGINEER SPMCC NO 123 OF 2017, SPMCC NO 124 OF 2017, SPMCC No125 OF 2017 and SPMCC NO 126 OF 2017 so as to bring their application within the purview of this court's appellate jurisdiction.
11. My finding is that, in the circumstances of this case, the appropriate court to issue the order for stay of execution is the court to which the decree has been sent for execution or the court that issued the judgment. The applicants did not explain why they opted to file the instant application before this court instead of the court that issued the decree in contravention of the clear provisions of the law.
12. I therefore find that the present application is misplaced as it has not been filed before the proper forum. Consequently, I strike it out with costs to the respondents.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF DECEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Munguti for Ms Foza for Applicant.

Mr. Makhandia for Gwandaruru for 1st respondent.

Mr. P.K. Njuguna for 2nd to 5th Respondents.

Court Assistant: Margaret

