



**Ngomat v African Merchant Assurance Co Ltd; Maina (Interested Party) (Commercial Case E010 of 2023) [2025] KEHC 3197 (KLR) (Commercial and Tax) (15 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 3197 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E010 OF 2023  
GL NZIOKA, J  
JANUARY 15, 2025**

**BETWEEN**

**MARTIN NGOMAT ..... PLAINTIFF**

**AND**

**AFRICAN MERCHANT ASSURANCE CO LTD ..... DEFENDANT**

**AND**

**JACKSON MAINA ..... INTERESTED PARTY**

**RULING**

1. By a notice of motion application dated 12<sup>th</sup> October 2023, brought under the provisions of; Order 40 Rule 1 & 2 of the Civil procedure Rules 2010 and any other enabling provisions of the law, the applicant is seeking for the following orders: -
  - a. Spent
  - b. That pending the hearing and determination of this application, this Honourable Court be pleased to issue directions ordering that the lower court stay proceedings of Naivasha Small Claims SCC E420/2023. This will enable the applicant prosecute the instant declaratory suit and a determination be made on who is the right party to satisfy the payment of the subject claim.
  - c. That pending the hearing and determination of this declaratory suit this Honourable Court be pleased to issue an injunction/stay of proceedings and its subsequent execution.
  - d. That this Court directs that the instant declaratory suit be heard and determined on priority basis so as not to delay the primary suit being Naivasha SCC E420/2023.



- e. That the defendant bear costs of this application.
2. The application is based on the ground thereto and affidavit in support of the even date sworn by the applicant. He avers that, the Interested party has instituted a suit vide SCC E420 of 2023 for damages arising from a road traffic accident that occurred on the 9<sup>th</sup> day of October 2020. However, he is apprehensive that if judgment is entered against him, execution may be levelled against him wrongly.
3. It is the applicant's contention that, the defendant had insured his motor vehicle registration No. KAH xxxR, vide Insurance Policy No. AM/070/148140/2020 with effect from 1<sup>st</sup> July 2020 to 3<sup>rd</sup> February 2021 and the policy was to cover eventualities including accidents.
4. The subject vehicle was involved in an accident and upon occurrence of the accident, he notified the defendant but the defendant has failed to compensate or appoint a legal representative in the subject matter which is breach of the insurance contract.
5. That as a result he has filed the declaratory suit herein to enforce the claim against the defendant for indemnity. That in the given circumstances it is only fair that the proceedings in SCC No. E420 of 2023 be stayed pending the determination of the declaratory suit to be heard on priority basis.
6. However, the application was opposed by the interested party vide the ground of opposition dated 19<sup>th</sup> October 2023, which states that:
  - a. The application herein is bad in law, incompetent, fatally defective and amounts to misinformed abuse of the Court process and/or otherwise a futile misuse of the precious judicial time and should be struck out with costs to the interested party.
  - b. The Insurance (motor Vehicle Third Party Risk) Act upon which the applicant's declaratory suit is grounded and hence this application does not confer upon the applicant the locus to file such a suit and as such the applicant has no locus standi and consequently, both the suit and the application are incompetent and should be struck out with costs to the interested party.
  - c. This is a subrogation claim and the application offends the interested party insurer's statutory right to claim.
  - d. This application as framed portend a serious and unwarranted impediment to the interested party's constitutional right of access to justice and there is no legal justifiable reason offered by the applicant to this Honourable court to warrant the exercise of this court's powers to interfere with the proceedings before the trial court.
  - e. This application is speculative and does not satisfy the threshold for stay of proceedings as the applicant has failed to demonstrate any substantial loss that will result if the stay is not granted.
7. Apparently the applicant filed a document entitled "replying affidavit" dated 24<sup>th</sup> October 2023 in response to the grounds of opposition by the interested party. With utmost respect, a replying affidavit cannot be sworn in response to grounds of opposition which are purely on points of law. Whatever the case, the applicant states in subject replying affidavit that, he is entitled to protection against wrongful attachment as much as the interested party is entitled to be paid.
8. That, the Motor Vehicle Insurance (Third Party Risk) Act does not bar him from seeking to protect his rights if they are violated. Further the court has the power to hear this matter and issue conservatory orders. Finally, that, the Small Claims Court has no power to stay proceedings or judgment of the same concurrent court.



9. The defendant also opposed the application vide grounds of opposition dated 23<sup>rd</sup> April 2024. The same states as follows: -
- a. That the application is misconceived, bad in law, incompetent and otherwise an abuse of the court process.
  - b. That the application is not only bad in law but also filed in bad faith as it anticipates the decision of the Small Claims Court in which the primary suit is still pending and seeks to circumvent, frustrate, interfere and nullify the same even before it is made and as such the application and the suit offends the Section 6 of the Civil Procedure Act as it is sub judice.
  - c. That the original jurisdiction for a declaratory suit vests with the Small Claims Court in which the primary suit is filed but not the High Court.
  - d. That the orders sought seeking injunction/stay of proceedings in the notice of motion cannot issue and is unenforceable as the declaratory suit ought to be filed in the Small Claims Court after the conclusion of the primary suit and that the plaintiff is seeking for this court to issue orders in vain.
  - e. That pending the hearing and determination of the primary and declaratory suit in the Small Claims Court, no other proceedings should be entertained in the High Court in this suit. That the Applicant always has a right to appeal after determination of the suit in the subordinate court.
  - f. That the plaintiff has not placed on record any admissible evidence to prove the existence of a policy of insurance issued by the defendant with respect to motor vehicle registration number KAH xxxR.
  - g. That there is no prejudice suffered by the plaintiff/applicant as a result of the if this application is dismissed.
  - h. That the application herein against the defendant be struck out and wholly dismissed as this Honourable court lacks jurisdiction to entertain the suit as the primary suit is still live in the small claims court.
10. The court directed the matter be argued orally, however, I note that, the applicant filed submissions 9<sup>th</sup> May 2024. In a nutshell he states that a prima facie case is as defined in the case of; Mrao Limited -vs- First American Bank of Kenya Ltd 2003 eKLR and the principles of granting interim conservatory orders are stated by the Supreme Court of Kenya in the case of Gatiaru Peter Munya -vs- Dickson Mwenda Kithinji and 2 others Application No. 5 of 2014 (2014) eKLR.
11. The applicant made further reference to the provisions of Article 23 and 159 of the Constitution and Rule 23 of Mutunga Rules and submitted further that he will suffer irreparable loss if his assets are attached and that it will affect him emotionally, financially psychologically and physically.
12. That even then the matter in the Small Claims Court has now been determined and based on the aforesaid the balance of probabilities in this matter tilts in favour of the applicant.
13. I have considered the application in the light of all the materials placed before the court and I note that, the applicant has annexed to the affidavit in support of his application a statement of claim filed against him by the Interested party is seeking for orders stated in the said statement.
14. I also note that, the applicant avers that the defendant had insured his motor vehicle at the time when the accident herein occurred. In support thereof, he has annexed a police abstract. A perusal thereof



reveals that, an accident occurred on 9<sup>th</sup> October 2020, involving motor vehicle registration No. KCQ xxxT and the applicant's motor vehicle registration No. KAH xxxR.

15. However, other than the particulars of the policy No. AMD/070/1/148140/2020 indicated in the police abstract, the applicant has not produced any policy documents to prove that, the defendant had insured his motor vehicle.
16. Furthermore, the applicant avers that, as the defendant is the insurer of his motor vehicle this court should declare it liable for the entire material damage claim. However, the court cannot do so, as there is no proof of such insurance. Even then, the critical issue to consider is whether any liability has crystallized upon which the defendant can be held liable.
17. The applicant admits in his grounds in support of the application that, the Small Claims Case No. E420 of 2023 is still alive. That, so far, there is no judgment against him which the defendant would be liable to settle. He is thus apprehensive that if judgment is entered against him, the defendant may not settle it. But the applicant's fear is unfounded on the ground that, the courts do not issue speculative orders. What if the claim in SCC No. E420 of 2023 is dismissed. What purpose will the order herein achieve?
18. Furthermore, there is no evidence that, the defendant has written to the applicant denying liability, nor even rescinding the contract of insurance between the applicant and defendant.
19. It is also noteworthy that the Interested party is not a party to the insurance contract between the applicant and defendant. Therefore to stay the proceedings in the SCC No. E420 of 2023 will be prejudicial to him. At least the best the applicant can do, is to seek for stay of execution of any judgment that may be entered against him.
20. Even then from the submission filed by the applicant the judgment is said to have been delivered in the subject Small Claims Court suit No. E420 of 2023 in which case, the prayers for stay of proceedings in that matter have been overtaken by events and cannot be granted. Basically the entire application collapses.
21. Consequently the application is dismissed with orders that each party meets their own costs.
22. It is so ordered

**DATED, DELIVERED AND SIGNED ON THIS 15<sup>TH</sup> DAY OF JANUARY 2025**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

N/A for the applicant

Mr. Kipkorir for the respondent

Mr. Komen: court assistant

