



REPUBLIC OF KENYA



Kimachu & another v Monarch Insurance Ltd; Kirima (Interested Party) (Civil Case E156 of 2024) [2025] KEHC 1973 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1973 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE E156 OF 2024
LP KASSAN, J
FEBRUARY 13, 2025**

BETWEEN

JOAKIM MWANGI KIMACHU 1ST PLAINTIFF

JOSHUA MBUA GITUANJA 2ND PLAINTIFF

AND

MONARCH INSURANCE LTD DEFENDANT

AND

JULIA KARIMI KIRIMA INTERESTED PARTY

RULING

1. Before this Court is the Application dated 20.07.2024 by the Plaintiffs/Applicants brought under, Sections 1A, 1B, and 3A of the *Civil Procedure Act* Cap 21, Order 22 Rule 22, and Rule 52 of the Civil Procedure Rules 2010, Sections 5 & 10 of the Insurance (Motor Vehicle Third Party Risks) Act seeking orders: -
 - i. Spent
 - ii. Spent
 - iii. That pending the hearing and determination of this suit there be stay of execution of the judgment and decree of the small claims court in the primary suit Nairobi Sccc 1152 Of 2024 Julia Karimi Kirima-vs-joakim Mwangi Kimachu & Joshua Mbuu Gituanja.
 - iv. That the costs of this Application be provided for.
2. The grounds relied upon are that the 1st plaintiff owned a Tuk-Tuk registration number KTWC 333J, which was later sold to the 2nd plaintiff. The Defendant provided a comprehensive insurance cover for the said Tuk-Tuk. On March 21, 2023, the said Tuk-Tuk was involved in an accident along Mwiki-



Nyanya road. The Defendant's motor vehicle registration number KCN 687N was slightly damaged. The plaintiff was summoned to appear in the primary suit Nairobi Sccc 1152 Of 2024, which was heard and the Interested Party awarded Kshs 107,330/=. Despite being served with letters and pleadings, the defendant refused to settle the claim. The interested party is now seeking to execute the judgment in the sum of Kshs 150,689.43/=:, including costs.

3. The 1st Plaintiff deponed in the supporting affidavit reiterating the grounds therein. He deponed that the refusal of the Defendant to take up the liability and settle the decretal sum put the Plaintiffs at risk of being executed against. The Defendant was obligated under the Insurance Motor Vehicle Third Party Risks Act to settle any third party claims against the insured. That the Defendant never repudiated the plaintiffs' policy and ought to satisfy the decretal sum.
4. The Interested Party filed a Replying Affidavit in opposition of the Plaintiffs' application. She deponed the same was unnecessary and a ploy to delay the final judgment which was validly and legally entered in her favour. That the application lacked merit and was a delaying tactic. That she was not privy to the plaintiffs' contract with the Defendant and was therefore not a necessary party to these proceedings. She deponed that the Plaintiffs have not shown good faith having failed to defray even a fraction of the decretal sum. However, where the court was inclined to grant a stay of execution then the court should provide security for due performance. She further deponed that the court should protect a decree holder against being stopped from enjoying the fruits of their judgment. She prayed the application be dismissed to allow her proceed with execution.
5. The 1st Plaintiff filed a further affidavit wherein he deponed that the Interested Party's agents, servant's and/or employee M/S Nextgen Auctioneers had since served him with a proclamation of attachments dated 22.09.2024 upon Rehis Suppliers Limited a Limited Liability Company not privy to the suit and is a separate legal entity from its directors. The value of the attached goods was Kshs 2,000,000/= yet the decretal sum was Kshs 107,330/=. There is no affidavit of means from the Interested Party to show she would be able to refund the Applicants and/or Third parties in the event the decree is executed and goods are sold. The Interested party was the ultimate beneficiary of the suit herein and has not demonstrated she will suffer if the matter is determined on merit and on a priority basis. The suit seeks to have liability taken over by the rightful person having been comprehensively insured and not denying the interested party her rights and the fruits of the judgment.

Applicant's submissions

6. The Applicants submitted that the Interest Party had started the process of executing the judgment of the lower court. They were apprehensive that there was a likelihood of danger that the Interested Party may use any means whatsoever to execute the decree of the lower court. That the grant of orders of stay was discretionary. The joining of the Interested Party in this suit as a necessary party in the interest of justice and not to deny the Interested Party her rights and the fruits of a correct judgment. The suit herein was a declaratory suit under the provision of sections 5 and 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya. That the basis of the suit is to have the liability shifted to the Defendant. That if the interim prayer for a stay of execution is not granted this suit would be reduced to a mere academic exercise. The Applicants relied on the authorities of Andy Forwarders Services Ltd & Ano.-vs-Price Waterhouse Coopers Limited & Ano. (2012) eKLR, Upperhill Transporters Limited-vs-Trident Insurance Co. Limited & Ano. (2024) eKLR, Charles Makenzi Wambui-vs-Africa Merchant Assurance Co. Ltd & Ano. (2014) eKLR, Kimani-vs-Monarch Insurance Company Limited; Muigai (Interested Party) (Civil Suit E009 of 2024) (2024), Rose Wairimu-vs-Xplico Insurance Company Limited; Joyce Njeri (Suing as the mother and next friend of Mary Njeri) & 10 Others (Interested Parties) (2021) eKLR.



Interested Party's submissions

7. The Interested Party submitted that the Plaintiff/Applicant was bound by the decree to settle the judgment sum. That the filing of this declaratory suit did not discharge the Plaintiff/Applicant from their obligation. Further, that the declaratory suit had no bearing on the Interested Party as the question of contract was between the Plaintiff/Applicant and the Respondent. That the Plaintiff/Applicant has not made out a case for the grant of orders for stay of execution. That the power to grant such orders was discretionary (Fina Bank-vs-Spare & Industries Ltd Civil Appl. No. 25 of 2000 LLR 5844 (CAK) and the Plaintiff/Applicant having failed to meet the grounds set out under Order 42 Rule 6 (i) That the matter was brought without undue delay, (ii) Show that substantial loss may result to the Applicant unless the stay orders are granted relying on the authority James Wangalwa & Another-vs-Agnes Naliaka Cheseto (2012) eKLR and (iii) Provision for security for the due performance of the decree relying on the authority Forcin Motorcycle Co. Ltd-vs-Ann Wambui & Ano. (2018) eKLR and Mwaura Karuga t/a Limit Enterprises-vs-Kenya Bus Services Ltd & 4 Others (2015) eKLR. As such, this instant application was unmerited and was engineered to deny the Interested Party of the fruits of his judgment, that the same should be dismissed and the Applicant condemned to bear the costs of the suit.

Issues for determination

Has sufficient cause been established to warrant granting of orders for stay of execution pending the hearing of this suit?

Analysis and Determination

8. I have read the pleadings, responses and submissions filed by the parties.
9. In the case of Ndonye-vs-Invesco Assurance Co. Ltd (Civil Suit 23 of 2021) (2022) KEHC 416 (KLR) (5 May 2022) (Ruling), Odunga J. (as he was then) held:

“(10) As correctly submitted by the respondent and as was held by the court in Odonyo Osodo-vs-Rael Obara Ojuok & 4 Others (2017) eKLR, the court’s discretion in deciding whether or not to re-open a case which the applicant had previously closed cannot be exercised arbitrarily or whimsically but should be exercised judiciously and in favour of an applicant who had established sufficient cause to warrant the orders sought.

11. Some of the principles which should guide the court in the exercise of the aforesaid discretion were enumerated by Eboso J. in Victoria Naiyanoi Kiminta-vs-Gladys Kiminta Prinsloo (2019) eKLR in which the learned judge expressed himself as follows:

“29 In the instant application, the Applicant seeks stay of 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 his favour against the insured directly.

30 However, one cannot lose sight of the fact that the Applicant is in effect seeking that the Defendants pays the Interested Party the sum due to the Interested Party from the Applicant. Unless some



measure of protection is given to the Applicant, 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-vs-Africa Merchant Assurance Co. Ltd & Ano. (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 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 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 favour..... However, the plaintiff has opted to carry that burden on their behalf. If the suit herein is determined in favour 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.”

10. From the foregoing, the principal obligation to satisfy the decree rests squarely with the Applicant. In the event that the Defendant, as the Applicant’s insurer, fails to discharge the decree, the Applicant shall nonetheless remain liable for its satisfaction. The mere fact that the Defendant is contractually and statutorily bound to settle the decree does not absolve the Applicant of his obligations arising under the tort of negligence. It is noteworthy that nothing precludes the Applicant from discharging the decretal sum and subsequently instituting a claim against the Defendant for compensation or reimbursement.
11. In these circumstances, the Applicant has shown that the Interested Party has started the execution process in the primary suit, as such justice would best be served if a temporary stay of proceedings were granted to allow the Applicant an opportunity to prosecute his case. Accordingly, I hereby grant an order staying execution of the suits specified in the Motion, pending the hearing and determination of this suit, on the condition that the Plaintiff/Applicant prosecutes his case within 90 days from the date of this ruling. In the event of default, the stay shall automatically lapse.
12. The costs of this application are awarded to the Interested Party in any event.
13. Although the High Court has unlimited original jurisdiction (Article 165 (3) (a) Constitution of Kenya 2010) in civil matters, it can hear declaratory suits involving insurance matters. However, it is prudent that a party files a claim in the appropriate forum, such a claim should be filed at the High Court if the claim exceeds the pecuniary limits of the subordinate courts (See Corporate Insurance Company Limited-vs-Elias Okinyi Offere, CACA No. 12 of 1998) or involves complex legal questions. As the Magistrate’s Court has pecuniary jurisdiction to hear and determine this suit for Kshs 150,689.43/=, I hereby direct that this suit be transferred to the Chief Magistrate’s Court at Nairobi Milimani for hearing and final determination.



It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF FEBRUARY 2025.

L. P. KASSAN

JUDGE

In the Presence of:

Murithi for Plaintiff/Applicant

No appearance for Respondent

Awuor holding brief Achieng for interested party

C/Assistant – Carol

