



**Kogi v Muchiri (Sued as the Administrator of Ruth Wambui Muchiri - Deceased)
(Miscellaneous Civil Case E155 of 2024) [2025] KEHC 7393 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7393 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL CASE E155 OF 2024**

FN MUCHEMI, J

MAY 22, 2025

BETWEEN

SAMUEL MUTURI KOGI APPLICANT

AND

**FELISTER NJOKI MUCHIRI (SUED AS THE ADMINISTRATOR OF RUTH
WAMBUI MUCHIRI - DECEASED) RESPONDENT**

RULING

1. The application dated 24th September 2024 seeks for orders of stay of execution. He also seeks for orders to suspend or stay proceedings before Gatundu CMCC No. E035 of 2022 pending the hearing and determination of Gatundu CMCC No. E181 of 2024.
2. The respondent filed a Notice of Preliminary Objection dated 4th October 2024 and a Replying Affidavit dated 11th November 2024 in opposition of this application.

Applicant's Case

3. The applicant states that he is the judgment debtor in Gatundu CMCC No. E305 of 2022 whereas the respondent is the decree holder. The applicant avers that his insurer had committed to settle the claim in the primary suit and he filed a declaratory suit against his insurer in Gatundu CMCC No. E181 of 2024 which suit is still pending. The applicant states that at the time of the accident, his motor vehicle registration number KAS 286A had a valid insurance policy.
4. The applicant states that his insurer had taken up liability and instructed advocates to defend him in Gatundu CMCC No. E035 of 2022.
5. The applicant avers that the respondent upon service of the declaratory suit has provoked execution in Gatundu CMCC No. E035 of 2022 and on 23/9/2024 she served him with warrants of attachment.



The applicant argues that should execution be allowed to continue, the declaratory suit being Gatundu CMCC No. E181 of 2024 will be rendered an academic exercise.

The Respondent's Preliminary Objection.

6. The respondent argues that the current application violates Order 40 Rule 3(3) of the Civil Procedure Rules and Section 19 of the *Civil Procedure Act*. The respondent further argues that the application violates Section 6 and 7 of the *Civil Procedure Act* as it is interfering with a decree issued in another court to which no appeal or review has been filed and the trial court is functus officio.
7. The respondent states that the application is fatally defective as the suit filed in CMCC No. E181 of 2024 is a declaratory suit which cannot bar a successful decree holder from proceeding with execution. Furthermore Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act does not provide for stay of execution.

The Respondent's Case

8. The respondent states that the genesis of the matter is Gatundu Civil Case No. E035 of 2022 whereby judgment was delivered on 11th April 2023, which the applicant has not filed an appeal. The respondent argues that after she was issued with warrants of attachment on and sale, the applicant rushed to court and filed a declaratory suit being Civil Case No. E181 of 2024. The respondent states that the applicant lied to the court that execution began after the filing of the declaratory suit.
9. The respondent states that counsel on record is on record for both suits. Further, the defendant, Xplico Insurance Co. Ltd, in Civil Suit No E181 of 2024, instructed counsel on record in all the three matters and the fact that counsel herein has sued the entity that instructed him in CMCC No. E181 of 2024 spells a lot of mischief. The respondent argues that counsel on record cannot represent the plaintiff on instruction from the defendant.
10. The respondent states that she stands to suffer untold prejudice and injustice if the stay orders sought are not granted as the beneficiaries of the estate of the deceased will not be able to enjoy the fruits of the judgment despite going through a grueling mental and financial process to get justice.
11. The respondent states that parties should have equal footing and no party should have undue advantage over the other and as such the court by allowing the orders sought, the same would amount to shifting the footing of the parties to the advantage of the applicant.
12. The applicant filed a Supplementary Affidavit dated 28th February 2025 and avers that a moratorium under section 67C (10) of the *Insurance Act* does not shield an insurer from meeting their liabilities to third parties as held by the High Court in Re Blue Shield Insurance Company Ltd [2020] eKLR Civil Case No. 465 of 2011. The applicant further states that the declaratory suit filed against his insurer seeks to confirm whether liability passes to his insurer under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act and the moratorium alleged by the respondent does not hinge on that determination.
13. The applicant states that he has appointed advocates on record to represent him in the current matter as he has a right to appoint counsel of his choice.
14. The applicant avers that the moratorium referred to by the respondent is on payments by the insurer and does not affect the liability of the insured in a civil case.
15. Parties put in written submissions.



The Applicant's Submissions

16. The applicant refers to the cases of Abdi Abdullahi Somo vs Ben Chikamai Ahmed Qureshi & Director of Public Prosecutions [2016] KEHC 4283 (KLR) and Fazal vs Lias (Miscellaneous Application E109 of 2024) [2024] KEHC 8175 (KLR) (9 July 2024) (Ruling) and submits that a notice of motion is a competent way of initiating substantive proceedings in court.
17. The applicant submits that there are pending proceedings in CMCC No. E181 of 2024 and the said court cannot stay proceedings of equal status in CMCC No. E035 of 2024. The applicant argues that the current interlocutory proceedings were filed out of necessity as the respondent had threatened execution in the primary suit which would have essentially rendered the declaratory suit an academic exercise. Furthermore, the court hearing the declaratory suit had no jurisdiction to stay proceedings in the primary suit.
18. The applicant submits that the proceedings do not offend the doctrine of res judicata as the court is not being called upon to interrogate the suit in CMCC No. E035 of 2024 but only to stay execution therein. Further, the suit in CMCC No. E181 is yet to be heard and determined thus the suit is not res judicata. To support his contentions, the applicant relies on the case of Jenipher Anyango Oloo vs Buzeki Enterprises Limited & Another [2021] eKLR.
19. The applicant argues that a preliminary objection is based on a pure point of law and the fact that the respondent is challenging the current application on account of it being fatally defective as it cannot be used to bar execution of the primary suit, is not a pure point of law. The applicant argues that he filed the current application when the respondent triggered execution in the primary suit. The applicant further argues that he has filed a declaratory suit and allowing execution to proceed will render the entire declaratory suit an academic exercise.
20. The applicant refers to the case of Kuria vs Wanjohi; Chief Land Registrar (Interested Party) (Environment & Land Case E068 of 2024) [2024] KEELC 1700 (KLR) (4 April 2024) (Ruling) and submits that the application does not violate Section 6 of the *Civil Procedure Act* as this court is not rehearing the two suits.
21. The applicant relies on the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696 and submits that the preliminary objection does not raise pure points of law but raises facts.
22. The applicant argues that the current proceedings and the declaratory suit are brought under Section 10(1) of the Insurance (Motor Vehicle Third Party) Risks Act which generally places a duty upon an insurer of a motor vehicle to satisfy judgments on behalf of their insureds. The applicant relies on the case of Francis Mwobobia vs Invesco Insurance Co. Limited; Mwirigi Muguna Nkoroi (Intended Interested Party/Applicant) [2021] eKLR and submits that his motor vehicle was insured at the time of the accident and his insurer by law is required to satisfy a judgment in favour of its insured. The applicant argues that irreparable damage will therefore accrue should execution proceed in the primary suit and the declaratory suit is determined in his favour.
23. The applicant submits that there is no law that bars a litigant from instructing an advocate to represent them in a suit.

The Respondent's Submissions.

24. The respondent submits that the applicant sought to have the judgment in the primary suit set aside, which prayer was granted but he then failed to comply with the conditions imposed by the court,



resulting in reinstatement of the judgment. the applicant thereafter filed a declaratory suit in CMCC No. E181 of 2024 based on the judgment in the primary suit seeking to have Xplico Insurance satisfy the decree however the suit remains pending with no action taken in it. The respondent argues that since judgment in CMCC No. E035 of 2022 was delivered in the year 2023, no appeal has been preferred against it thus it remains a valid judgment and thus Order 40 Rule 1 does not apply as the same only refers to wrongful execution. The respondent further relies on Order 22 Rule 22 of the Civil Procedure Rules and submits that the applicant has not filed an application where the judgment was rendered or in the present appellate court and therefore the current application is a miscellaneous application made with no pending appeal. Thus the application as placed before the court is not grounded in law and is fatally defective.

25. The respondent argues that since the application is not grounded in law, the court has no jurisdiction to determine an application which the law does not provide. To support her contentions, the respondent relies on the cases of Phoenix of E.A Assurance Company Limited vs M. Thiga t/a Newspaper Service [2019] eKLR; Equity Bank Limited vs Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR and Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd [1989] eKLR.
26. The respondent refers to the cases of Waweru vs Xplico Insurance Company Limited; Ngeno [ᄁ 2 Others \(Interested Parties\) \(Civil Suit E22 of 2023\)](#) [2024] KEHC 9152 (KLR) (19 July 2024) (Ruling); Kassam Hauliers Limited vs Mezgebu Gatachew Mammo [2022] eKLR; Dolk Limited vs Invesco Assurance Company Limited & 5 Others [2018] eKLR; Jane Wanjiru Mwangi vs Xplico Insurance Co. Ltd & Another (2021) eKLR; Stephen Amollo Odhiambo vs Monarch Insurance (2022) KEHC 15610 (KLR); Daniel Mutua Musyoki vs Amaco Insurance Company Limited & Another (2023) eKLR; Geoffrey Gichomo Mwangi vs Xplico Insurance Co. Ltd & Another (no citation given) and Ndaka vs Kenya Orient Insurance Ltd & Another; Mutambu (Interested Party) (Civil Case E004 of 2024) [2024] KEHC 8451 (KLR) (11 Jul 2024) (Ruling) and submits that a declaratory suit cannot bar a decree holder from proceeding with execution.
27. The respondent refers to the cases of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors and Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others [2015] eKLR and submits that the preliminary objection is sustainable as it raises pure points of law on contravention of rules and jurisdiction of the court.
28. The applicant filed Supplementary Submissions dated 28th February 2025 and submits that whether or not a moratorium is in place against his insurer does not determine the issue of liability passing to the insurer as contemplated under Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act. To support his contentions, the applicant refers to the case of In Re Blue Shield Insurance Company Limited [2020] eKLR.
29. The applicant refers to the case of Mwavula vs [Waweru t/a Antique Auctioneers Agencies ᄁ Another \(Civil Appeal E374 of 2023\)](#) [2024] KEHC 5988 (KLR) (24 May 2024) (Ruling) and submits that the respondent raised new facts that the court in the primary suit downed its tools and was thus functus officio however it is trite law that submissions are not part of pleadings and thus the respondent is barred from introducing new facts in her submissions.



The Law

Whether the preliminary objection is sustainable.

30. The case of Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

31. Sir Charles Newbold P. stated:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

32. Similarly the Supreme Court in the case of Hassan Ali Joho & Another vs Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR held that:-

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

33. Further in the case of Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others, [2014] eKLR the court held that:-

Thus a preliminary objection may only be raised on a 'pure question of law.' To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

34. Evidently, a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

35. The appellant argues that the instant application violates Section 6, 7 and 19 of the *Civil Procedure Act* and Order 40 Rule 3(3) of the Civil Procedure Rules. Accordingly, the applicant argues that following the said violations in law, the court does not have jurisdiction to determine the application.

36. The court has perused the record and noted that the said application does not offend the doctrines of sub judice and res judicata pursuant to Section 6 and 7 of the *Civil Procedure Act*. The application herein seeks to stay the execution in the primary suit for the declaratory suit to be heard. It does not require this court to rehear the said suits.

37. The respondent further argues that the application is fatally defective as the suit filed in CMCC No. E181 of 2024 is a declaratory suit which cannot bar a successful decree holder from proceeding with execution. Furthermore Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act does not provide for stay of execution. The raised points are not crisp points of law and will be discussed



in the foregoing paragraphs. As such, it is this court's considered view that the preliminary objection is not sustainable.

Whether the court should grant stay of execution of the judgment and decree in CMCC No. E035 of 2022 pending the hearing and determination of the suit in CMCC No. E181 of 2024.

38. It is not in dispute that the respondent is the decree holder in CMCC No. E035 of 2022, the primary suit. Further, the applicant is the registered owner of motor vehicle registration number KAS 286A which was involved in an accident occasioning fatal injuries to the respondent herein. Upon judgment and decree being issued in the primary suit, the applicant filed a declaratory suit CMCC No. E181 of 2024 against his insurer, Xplico Insurance Company Limited seeking a declaration that the insurance company is bound to satisfy the decree in CMCC No. E035 of 2022 under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act. According to the applicant, he had a valid insurance cover being insurance policy number 070/EMT/TPO/THK/20/02099 and certificate of insurance number C20414756 for his motor vehicle registration number KAS 286A at the time of the accident.

39. It is trite law that the insurance company, Xplico Insurance company, under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act has a statutory obligation to pay the respondent who is a judgment creditor the decretal sum in respect of the liability that arose by use of the insured motor vehicle on the road unless the liability thereof has been avoided in accordance with the law.

40. Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act provides:-

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 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 interests on judgments.

41. There is variance of findings by the High Court on whether such an application or suit can succeed. Some courts have found merit in such applications of this nature while others have not. However, it is my considered view that the statutory right of action does not bar a decree holder from executing the decree issued in her favour against the insured directly.

42. This principle is well enunciated in *Jane Wanjiru Mwangi vs Xplico Insurance Co. Ltd & Another* (2021) eKLR where the court held:-

It is clear from the motion that the order sought is that a stay of execution of the judgment in the primary suit pending the hearing of the declaratory suit and that the said motion is predicated on the provisions of Sections 1A & 1B, 3, 3A and 63 (e) of the *Civil Procedure Act*; Article 159(2) of *the Constitution* and order 51 Rules 1, 3 and 4 of the Civil Procedure Rules.

Upon consideration of the cited provisions, I observed that none of them necessarily cater for a situation touching on a stay of execution of a decree pending the hearing and determination of an entirely new suit.

It is apparent the applicant is seeking a declaratory judgment against the defendant, her alleged insurer, and not against the interested party. It is also apparent that the judgment delivered in the primary suit has not been challenged by way of appeal or review.



That notwithstanding, I find that while the applicant is entitled to file a declaratory suit against the defendant pursuant to the provisions of the [Insurance \(Motor Vehicles Third Party Risks\) Act](#), in a bid to have the insurer settle any pending claims arising out of an insurance policy entered into between an insurer and its insured, this does not necessarily bar a decree holder from pursuing the decretal sum from an insured person, such as the applicant in this case.

43. Similarly in *Stephen Amollo Odhiambo vs Monarch Insurance (2022) KEHC 15610 (KLR)* the court held that:-

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.

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 for 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/-.

44. In *Daniel Mutua Musyoki vs Amaco Insurance Company Ltd & Another (2023) eKLR* the court held:-

The primary duty of settling the decree falls squarely on the applicant. In the event the 1st respondent as his insurer fails to satisfy the decree, the applicant will still be called upon to satisfy the same. Nothing prevents the applicant from settling the decretal sum and then suing the respondent for compensation or reimbursement.

In my opinion, the suit against the 2nd respondent was ill conceived. He is not privy to the contract between the applicant and the 1st respondent, who has conveniently failed to file any response. The matter is between the applicant and its insured. Period.

Entertaining this application and the suit for that matter will set an unacceptable precedent whereby any insured entity, on its own motion or covertly urged by its insurance company, will be moving to court to seek orders of this nature. This will defeat the purpose of this Act, which was to protect the rights of successful judgment holders in suits against a party who is insured under a policy falling within the ambit of the Act.

I am thus of the opinion that the plaintiff's case against the 2nd respondent has no foundation of law.

45. From the foregoing authorities, it is evident that the primary duty of settling the decree falls squarely on the applicant. In the event the applicant's insurer fails to satisfy the decree, the applicant will still be called upon to satisfy the decretal amount. The respondent is not privy to the contract between the applicant and his insurer. The matter in CMCC No. E181 of 2024 is between the applicant and his insurer and has nothing to do with the respondent herein. It would therefore not be in the interests of justice to curtail the right of the respondent of executing the decree. He is likely to be adversely affected should this application be allowed. The applicant is entitled to pursue his declaratory suit against his insurer for it is his right. However, the exercise of the applicant's rights should not frustrate or interfere



with the rights of the respondent. It is noted nothing prevents the applicant from settling the decretal sum and then suing his insurer for compensation or reimbursement.

46. Accordingly, it is my considered view that the application dated 24th September 2024 lacks merit and is hereby dismissed with costs.

47. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF MAY 2025.

F. MUCHEMI

JUDGE

