Mugambi & another v Nzioka (Civil Appeal E141 of 2024)
[2025] KEHC 10315 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10315 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL E141 OF 2024

HM NYAGA, J

JULY 10, 2025

BETWEEN

LEONARD MUNENE MUGAMBI ..... 1ST APPELLANT

KIRIMA GRANT MUGAMBI ..... 2ND APPELLANT

AND

MALVIN NZIOKA ..... RESPONDENT

RULING

1. The application for determination s dated 10/4/2025 and it seeks the following orders:-

    a. Spent

    b. That the orders of the Honourable Justice H. M Heston Nyaga made on the 6th day of November, 2024 directing the Appellants/applicants to pay to the Respondent Ksh 435,676/ = being half of the decretal sum within 30 days from the date of the Order dated 6th November, 2024 be reviewed and/or varied.

    c. That this Honourable Court be pleased to issue a stay execution of the decree and/or Judgment in Tigania Senior Principal Magistrate Court Civil Case No. E065 of 2023 pending hearing and determination of this application inter-partes.

    d. That this Honourable court be pleased to issue a stay of execution of the Decree and/or Judgment in Tigania Senior Principal Magistrate Court Civil Case No. E065 of 2023 pending hearing and determination of the declaratory suit in Tigania MCC E018 of 2025.

    e. That the costs of this application be provided for

    f. That such further and other relief be granted as this court deems fit and expedient in the circumstances.

2. The application is supported by the affidavit of the 1st applicant. In a nutshell, the applicant states that on 6/11/2024, the court directed that the applicant's to pay Ksh. 435,676/= which is half the decretal sum as a condition for stay of execution of the decree of the lower court. That the said amount is beyond the financial capacity of the appellants, who have now filed a declaratory suit against their Insurance Company, seeking that it pays the entire decretal sum in Tigania Law Courts Civil Case No. E018 OF 20205. That the court ought to stay the execution of the decree and review the earlier orders, pending the determination of the suit. That the applicant's stand to suffer irreparable loss and damage if the application is not allowed.

3. The respondent opposed the application vide a replying affidavit sworn on 2nd May, 2025. In a nutshell the respondent states that the applicants had in their earlier application dated 24th January, 2025, seeking stay pending this appeal, asked to be allowed to provide security by way of a Bank Guarantee issued by Family Bank. That conditional stay was issued by this court. That the applicant failed to comply with the said orders. That the applicants had gone back to the trial court, in a bid to circumvent the orders herein but the court failed to grant orders after it was made aware of this court's orders. That the applicants are people of means as can be seen from the property proclaimed, and are just refusing to pay the decretal sum.

4. It is further stated that the applicants are creating confusion as to whether they intend to prosecute the appeal herein or abandon the same and pursue the declaratory suit. That there are no grounds set out to warrant a review of the orders issued by the court. That security is a condition precedent to the grant of stay pending appeal. That whereas the applicants are entitled to seek a declaration against their Insurer, that is not a bar to execution by the respondent for the decree of the trial court.

5. Parties filed their respective submissions which I have perused and will not rehash, I will refer to them where necessary.

6. As has been correctly submitted by both parties an application for review is premised on section 80 of the *Civil Procedure Act* and Order 45 Rule 1, of the *Civil Procedure Rules* which provide as follows:-

> " Section 80
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> (a) Any person who considers himself aggrieved by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or order therein as it thinks fit".

Order 45

> " 45
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> (1) Any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his

knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies to the review".

7. The applicants urged the court to be persuaded by the finding in *RWW – VS - EKW* (2019) eKLR cited in *H.E -VS - SM* (2020) eKLR, where it was held that the purpose of stay of execution is to preserve the subject matter and ensure that parties exercising his right of appeal, if successful, does not have the same rendered nugatory.

8. The principles to guide the court in an application for review were restated in *Muyodi vs. Industrial & Commercial Development Corporation & Anor*., (2006) 1 EA 243, where the Court of Appeal stated:

> " For an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay".

9. I have looked at the application. In my view, what the applicants are seeking is basically an order to set aside the earlier orders. There is no error, apparent on the facts on the record, or any new matter that has arisen. They are basically asking this court to look at the same material once again and come up with a different determination.

10. In my orders of 6th November, 2024, I noted that the appeal herein is basically on the quantum of damages awarded by the trial court, hence the orders to pay half the decretal sum. The fact that the applicant have filed a declaratory suit against the Insurance Company is not a valid a grant to stay an execution. The primary duty to satisfy a decree lie with the Judgment Debtor. He should satisfy the decree then seek indemnity from the Insurer. Any other ruling would render all judgments of this nature useless as they can never be executed. The issue at hand is not new as it has been dealt with by the superior courts.

11. In *Buzeki Enterprises Ltd Vs African Merchant Assurance Ltd* (2021) eKLR, it was held as follows:

> " That aside, I observe that the trial court proceeded to entertain the application dated 20.12.2018, yet the provisions of section 10(1) of the *Insurance (Motor Vehicle Third Party Risks) Act* do not provide for stay of execution. The said section provides that:
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> 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.

The 1st respondent was thus justified in seeking a declaratory judgment against the 2nd respondent, its alleged insurer. I also note that the judgment delivered in the Siaya PMCC 75 of 2016 has not been challenged by way of an appeal or review. However, whereas an insured may well be entitled to file for a declaration that its insurer is obliged to settle decree against the insured under the insurance policy, that statutory right of action does not bar a person who is injured from executing the decree issued in its favour against the insured directly as was held in the case of *Dolk Limited* (supra).

In the circumstances, it is my view that the trial court erred in staying execution of decree issued in favour of the appellant against the 1st Respondent insured, pending the hearing and determination of the declaratory suit. This is because the application dated 20.12.2018 was firstly, res judicata the application dated 24.9.2018 filed by the 1st respondent in Siaya PMCC 75 of 2016 and secondly, because the filing of a declaratory suit is no bar to execution of decree by a genuine decree holder.

In the end, I find and hold that the trial Magistrate erred in granting stay of execution of decree in Siaya PMCC No. 75 of 2016 by a ruling delivered on the 27.6.2019 in Siaya Principal Magistrates Court Civil Case No. 36 of 2019. I allow this appeal, set aside and vacate the orders issued on 27/6/2019 by Hon James Ongóndo, Principal Magistrate and substitute them with an order dismissing the application dated 20th December, 2018. The appellant shall have costs of this appeal and of the application in the lower court, giving rise to this appeal."

12. Similarly in *Stephen Amollo Odhiambo Vs Monarch Insurance* (2022) KEHC 15610 (KLR) it was 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.
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> 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."

13. In *Daniel Mutua Musyoki Vs. Amaco Insurance Company Ltd & Another* (2023) eKLR, I dealt with a similar application. I found that:

> " 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 insurer. 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 the 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 any foundation in law."

14. Having considered the matter, I find that the application lacks merit and it is dismissed with costs.

DATED, DELIVERED AND SIGNED AT MERU THIS 10TH DAY OF JULY, 2025

HON. H. M NYAGA

JUDGE