



**Nchau v Gatimu (Miscellaneous Civil Application E058 of 2024)  
[2025] KEHC 10975 (KLR) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10975 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
MISCELLANEOUS CIVIL APPLICATION E058 OF 2024**

**EM MURIITHI, J**

**JULY 24, 2025**

**BETWEEN**

**ADRIAN NCHAU ..... APPELLANT**

**AND**

**CYRUS KABIRU GATIMU ..... RESPONDENT**

**RULING**

1. The applicant filed a notice of motion dated 15<sup>th</sup> July, 2024 seeking the following orders:
  1. Spent.
  2. Spent.
  3. That the honourable court be pleased to issue an order of stay of execution of the judgment and decree in Wang’uru CMCC No. E078 of 2021 pending the hearing and determination of Wang’uru CMCC No. E076 of 2024.
  4. That costs of this application be provided for.
2. The application is based on the grounds on the face of the application and the supporting affidavit of the applicant. The applicant avers that as at the time of the accident, his motor vehicle KCD 610D which caused the accident subject of the primary suit had a valid insurance policy from the Directline Assurance Company Ltd. He was served with warrants of attachment by the Respondent auctioneers in execution of the decree in the primary suit. His insurer has failed and/or neglected to settle the decretal sum in the primary suit despite defending the suit to conclusion. He has since filed a declaratory suit seeking to compel his insurer to settle the decretal sum in the primary suit via Wang’uru CMCC No. E076 of 2024.
3. Further, the declaratory suit is scheduled for mention on 6 August 2024.



4. Lastly, the applicant avers that he fears that execution might be levied against him unless the interim orders are granted yet he had a valid insurance cover for the motor vehicle as at the time of the accident subject of the primary suit and the respondent has refused to make good the payment of the decretal sum in Wang'uru CMCC No. E078 of 2021.
5. The respondent on 1<sup>st</sup> August, 2024 filed Replying Affidavit indicating that the applicant was granted 30 days stay of execution on 27/2/24 when judgement was delivered by the Honourable court and subsequently a demand letter was duly served upon the applicant after judgement as well as numerous demand letters despite being an active party in the proceedings but the same were never responded to date which is a clear indication that the applicant is out to frustrate the respondent in realizing the fruits of the trial court's judgement.
6. Further, that the Applicant having failed to settle the decretal sum the Respondent proceeded to extract the Decree and Certificate of costs. Thereafter, Bealine Auctioneers obtained warrants of attachment and sale procedurally and duly signed by the trial court and the auctioneers proceeded to proclaim the Applicant's movable goods and gave the Applicant 14 days to settle the decretal sum and auctioneers' fees.
7. Lastly, that the assertion by the Applicant that he will suffer irreparable loss if stay is not granted is farfetched as the process of execution does not amount to substantial loss since execution is a legal process sanctioned by the law. On the other hand, the Respondent stands to suffer immense prejudice if this application is allowed.

#### **Applicant submissions**

8. As at 16/7/2025, there were no submissions for the Applicant on record.

#### **Respondent submissions**

9. In this case, the applicant has not stated whether or not he is likely to suffer substantial loss should execution proceed.
10. The court in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR held,  
“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”
11. The respondent submits that the applicant has not demonstrated at all what he is likely to suffer should execution proceed and the effect thereof for the court to weigh the same against the prejudice the respondent who is to be put on hold and thus denied a chance of enjoying the fruits of the judgment. It is not enough to just say that there is ‘imminent danger of execution.
12. They submit that litigation must come to an end and a successful litigant be allowed to enjoy the fruits of the judgment without hindrance from a party bent on scuttling the same via unscrupulous means. The applicant is bent on engaging the Respondent in an endless litigation and the same ought to be frowned upon by this honourable court.



13. The Court of Appeal in *Karanja v Ndirangu & Another* (Civil Application 5 of 2021) [2021] KECA 57 (KLR) (8 October 2021) (Ruling) held that;

“ All litigation must sooner than later come to an end and its conclusion must have finality. We are aware that litigation is burdensome tedious time consuming and costly and it is time or the applicant to realize that he has reached the end of the road. It may be painful and sometimes unfavourable to him but the earlier he comes to the realization that time is up, the better.”

14. The respondent has already commenced the process of executing the decree and it would be prejudicial to him to return the matter to a never ending cycle of litigation. The Respondent should not suffer as no party should have undue advantage over another especially a party who has consistently made it its business to abuse the court’s process.
15. Lastly, they submit that the application is a non-starter and an afterthought having been brought after an unreasonable and inordinate delay of over (6) Six Months since the trial court delivered its judgement on 27<sup>th</sup> February, 2024.

### **Issue**

16. Whether stay of execution should be granted pending hearing and determination of the declaratory suit.

### **Analysis**

17. The applicant seeks for the honourable court to issue an order of stay of execution of the judgment and decree in Wang’uru CMCC No. E078 of 2021 pending the hearing and determination of Wang’uru CMCC No. E076 of 2024.
18. The declaratory suit is filed pursuant to the provisions of section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* which section obligates an insurance company to satisfy decrees made against its insured. A decree made against an insured is usually enforced by filing a declaratory suit against the insured’s insurance company. 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.

19. The merits of the declaratory suit is the province of the trial court.
20. The grant of stay of proceedings in execution of the judgment and decree in Wang’uru CMCC No. E078 of 2021 is at the discretion of this court on principles of justice akin to the well principles of an interlocutory injunction, bearing in mind that the declaratory suit is not before this court and that there is already a judgment in favor of the respondent decree/holder who is not a party to the contract of insurance sought to be enforce or voided, as the case may be.



21. The Respondent deposed that the applicant was granted 30 days stay of execution on 27/2/24 when judgement was delivered by the Honourable court and subsequently a demand letter was duly served upon the applicant after judgement as well as numerous demand letters despite being an active party in the proceedings but the same were never responded to date which is a clear indication that the applicant is out to frustrate the respondent in realizing the fruits of the trial court's judgement.
22. However, the applicant avers that he fears that execution might be levied against him unless the interim orders are granted yet he had a valid insurance cover for the motor vehicle as at the time of the accident subject of the primary suit and the respondent has refused to make good the payment of the decretal sum in Wang'uru CMCC No. E078 of 2021.
23. I should respectfully agree with *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) where Muchemi J. held: 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.
24. In the same vein, the Court has noted the decision in *Njeru Patrick Vs. Invesco Assurance Co. Ltd.* (2021) eKLR, where the Court (Odunga, J. as he then was) stated that:

“ 27. I must however state that the primary obligation of settling the decree falls squarely on the Applicant and in the event the Defendant as his insurer fails to satisfy the decree, the Applicant will still be called upon to satisfy the same. The mere fact that the Defendant is bound both contractually and statutorily to satisfy the decree does not absolve the Applicant from meeting his obligations under the tort of negligence. Therefore, I respectfully disagree with the view that by not granting the stay herein, 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 to recoup any extra sums that they may have paid to third (interested) parties. It must be noted that nothing prevents the Applicant from settling the decretal sum and then suing the Defendant for compensation or reimbursement.

28. It is my view that in these circumstances, justice would be done to all the parties if there was a stay of proceedings for a short period to enable the Applicant prosecute his case.

Accordingly, I hereby grant an order staying execution in Kithimani PMCC No. 317 of 2016 pending the determination of this suit on condition that the Plaintiff/Applicant secures a bank guarantee or any other form of security, movable or immovable, for the said decretal sum as security for the due performance of the decree or order as may be ultimately be binding on him within 30 days of this order. In default the stay will automatically lapse.”

25. This Court understands the issue before the court as it said in *Pasha Enterprises Limited v Kenya Alliance Insurance Company Limited; Karama & Yussuf (Suing as the Legal Representatives of the*



- “ 13. The situation before the court is resolved in this way: the plaintiff insured has a right under access to justice to file the declaration suit in enforcement of alleged breach of contract. The decree holder in the trial court suit is entitled to enforcement of the fruits of his judgment, subject only to a successful appeal. The decree-holder is not beholden to the insured’s claim in breach of contract in a declaratory suit. Consequently, the decree-holder is entitled to recover the award in his judgment, subject only to appeal but the insured defendant is entitled to recover by declaratory suit or otherwise the benefit of his insurance contract in which no privity of contract exists as against the successful suitor/decree-holder.”
26. The applicant is apprehensive that the respondent will execute as against him hence defeating the essence of the declaratory suit. As pointed by Odunga, J. it is not correct to suggest that the Court would be aiding the insurer to avoid a statutory contractual obligation, if stay of execution is not granted.
27. In the interest of justice, seeing that according to the warrant of attachment the decretal sum is a substantial sum of Ksh.1,559,382/- and balancing the rights of the decree-holder and the judgment debtor who seeks declaratory order against his insurer, the Court will grant a stay of execution on condition that the applicant judgment debtor shall deposit into court as security the sum equivalent to half (1/2) the decretal sum within 30 days from the date hereof.

#### **Orders**

28. Accordingly, for the reasons set out above, the court grants the application for stay of execution pending the hearing and determination of the declaratory suit on condition applicant/judgment debtor shall deposit into court as security the sum equivalent to half (1/2) the decretal sum within 30 days from the date hereof.
29. In default, the order of stay of execution shall lapse and be of no effect.
30. The Applicant will pay the costs of the application to the Respondent.
31. File closed.

Order accordingly.

**DATED AND DELIVERED THIS 24<sup>TH</sup> DAY OF JULY 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances

M/S TMM Advocates for the Applicant.

Mr. Mugendi for the Respondent.

