



Kilonzo & another (Suing on behalf of the Estate of Augustine Mulela Munyilu - Deceased) v Xplico Insurance Company Limited; Irungu and Ngari (Their personal representative and legal administrator of the Estate of the Late Zachary Mbogo Maina) & another (Interested Parties) (Civil Suit E009 of 2024) [2025] KEHC 12585 (KLR) (12 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12585 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL SUIT E009 OF 2024
TM MATHEKA, J
SEPTEMBER 12, 2025**

BETWEEN

**FELISTUS MULI KILONZO 1ST APPLICANT
JAMES K MUSYOKI 2ND APPLICANT
SUING ON BEHALF OF THE ESTATE OF AUGUSTINE MULELA MUNYILU -
DECEASED**

AND

XPLICO INSURANCE COMPANY LIMITED RESPONDENT

AND

**ALICE WAITHAGA IRUNGU AND MERCY WAKERA NGARI (THEIR
PERSONAL REPRESENTATIVE AND LEGAL ADMINISTRATOR OF THE
ESTATE OF THE LATE ZACHARY MBOGO MAINA) INTERESTED PARTY
STELLA NZILANI MUSYOKI AND FLORENCE N'THENYA MUSYOKI (Suing
AS THE NEXT OF KIN TO AND ON BEHALF OF THE ESTATE OF JOSEPH
MUTUKU MUSYOKI - DECEASED) INTERESTED PARTY**

RULING

1. Before me is the notice of motion brought under sections 1A,1B,3,3B of the CPA and Order 51 of the CPR 2010.
2. The applicant seeks inter alia that pending the hearing and determination of this suit there be a stay of execution of the decree issued in Kilungu PMCC E 292 of 2022 and stay of proceedings in Kilungu PMCC E174 of 2023.



3. The grounds for the application are on the face of the application. Mainly that there was an accident involving motor vehicle registration number KBJ 103D and KCH 893D.
4. That Augustine Mulela Muniyilu (deceased) was the owner and driver of motor vehicle KBJ 103D and as at 26th of October 2019 he had a valid insurance policy cover no. 07 /NAT/TPO/ DEV/19/E00047 with the defendant in respect of the said motor vehicle.
5. That the accident occurred during the pendency of the said insurance policy; that the accident was reported to the defendant in accordance with the conditions of the insurance policy, but the defendant had refused or declined to take up the matter claiming that it was conducting internal investigations into the claims and would take them up after the investigations.
6. That following the accident, the first interested party instituted PMCC E292 of 2022. While the plaintiff applicants instituted PMCC number E 293 of 2022 and the second intercept party later instituted PMCC 174 of 2023 .
7. That PMCC 292 and 293 were consolidated and judgment was delivered on the 26th of September 2023 where liability was apportioned at the ratio of 50:50 as against the plaintiffs and the 1st interested party. That the plaintiffs were also enjoined in PMCC 174 of 2023. That the 1st interested party had obtained and served warrants of execution against the plaintiffs and proceeded to proclaim the plaintiff's applicant's property for execution and that PMCC 174 of 2023 was due for hearing and if the same was heard and determined, execution would proceed against the plaintiff applicant for the 50% liability despite there being a valid insurance cover.
8. That it is on the basis of these facts that the plaintiffs seek these orders as they risk being rendered completely bankrupt and destitute through attachments and executions. The plaintiffs will suffer irreparable loss despite there being a valid insurance cover with the defendant.
9. The application is supported by the affidavit of a Felistus Muli Kilonzoreiterating the foregoing facts. In the affidavit , the applicant has annexed the plaints in the lower court matters, the death certificate of the insured, the police abstract showing the insurance for the two motor vehicles, the judgment of the subordinate court and the warrants from Ruolauctioneers.
10. The first interested party filed a reply opposing the application. Sold by Alice Irungu Waithaga. It is her position that the application is an afterthought and is manifestly devoid of any triable issue; that it is in bad faith, frivolous, vexatious and an abuse of the court process and meant to deny the first interested party enjoyment of the judgment entered in her favor. That the plaintiff applicant has received her decretal sum from the insurance that is Geminia insurance, who was a co- defendant in Kilungu PMC 292 of 2022. That the judgment delivered on 26th of September 2023 in Kilungu PMC 292 of 2022 where liability was apportioned in the ratio of 50: 50 between the plaintiff applicant and the first interested party entitled the first interested party to a sum of Kenya shillings, 2, 346,339 against the plaintiff applicant.
11. That in any event the defended respondent was not a party in Kilungu PMCC 292 of 2022 and therefore the subsequent orders issued in this application will only have an adverse effect towards the first interested party. That the plaintiff applicant has the opportunity to prosecute her case and seek the declaratory order sought against the defendant respondent without having to inconvenience the first interested party by holding them in abeyance.
12. That the plaintiff applicant should pay half the decretal sum and deposit the remaining half in an interest earning account in the name of the first interested party and the plaintiff applicants advocates. That the court should take judicial notice of the fact that the defendant respondent is already under



statutory management as it was on the verge of collapsing and the first interested party will likely suffer substantial loss and damage if the order sought in the application are granted.

13. Parties filed written submissions. For the plaintiff /applicant. It is submitted that this court has in a similar matter and allowed the application. The applicant has cited, among other matters,
14. Frederick Gathungu Njenga vs Africa Machine Assurance Company Ltd. And others Nakuru HCCC No. 65 of 2015 where the court stayed execution in Nakuru. CMCC no. 549. Of 2017 pending the hearing and determination of the case No.65 of 2015 where the applicant was seeking a declaration that the plaintiff's insurer was obligated to satisfy the state judgment in the parent suit.
15. Samuel Githinji Mwangi v Xplico Insurance Company Limited & 2 others [2017] KEHC 1149 (KLR) similar orders were made.
16. Rose Wairimu v Xplico Insurance Company Limited; Joyce Njeri (suing as the mother and next Friend of Mary Njeri), Joyce Njeri Kimani(Suing As The Next Friend of Samuel Kimani), Gladys Wanjiru Kimondo (suing as the mother and next Friend of Margaret Muthoni); Joyce Njeri Kimani (suing as the Mother and Next Friend of Faith Wangari), Gladys Wanjiru Kimondo, Geoffrey Kabu Kanyi, Charles Weru, Divina Kerubo, Joseph Kariuki Maina, Joseph Kimani Kariuki & Sarah Wanjiri Kamau (Interested parties) [2021] KEHC 6090 (KLR) where this court allowed the application for stay pending the hearing and determination of the suit.
17. It is further the submitted that the first interested party's motor vehicle, KCH 893D had a valid insurance policy cover with Geminia Insurance Company and that company has settled the plaintiff's decretal sum as it was a contractual obligation that this was the same way the plaintiffs KBJ 103D had a valid insurance policy with Xplico Insurance Company Limited, hence the defendant should settle the first and second interested parties claims as a contractual obligation. That the fact that the defendant has been placed under statutory management does not. Mean that it has collapsed. That a regulator just takes over the company's core functions and operations to protect the public from losses and to try to revive the company. If anything, the policyholders compensation fund compensates affected claimants that the law has put into place mechanisms to protect both the policyholders and the victims.
18. For the first interested party, it was submitted that The applicant's application is incompetent and misconceived. And only aimed to delay the first interested parties enjoyment of the fruits of a successful litigation. And that the application does not meet the threshold for granting stay of execution.
19. Relying on order 42 rule 6(1) of the civil procedure rules The first intersect party submits that It provides for stay pending and appeal from the lower court decision, but in this case that is not the intended case and therefore the application is misconceived.
20. It is submitted that the process of execution does not amount to substantial loss because execution is a lawful process and the failure by the applicant to tender any material and information that should indicate that she stands at risk of substantial loss moneywise can only infer that the applicant has no sufficient ground to prove that she will suffer substantial loss if the order for stay is not allowed.
21. The first interstate party relies on Kenya Shell Limited v Benjamin Karuga Kibiru and Ruth Wearing Mukaruga. 1986 KECA 94 KLR on the need to establish or provide evidence of stature loss. And James Wangalwa and another v Agnes Naliaka Cheseto [2012]KE H C 1094 (K L R) For the proposition that they? Process of execution. Does not amount to substantial loss because execution is a lawful process.
22. It is submitted that the court must balance the rights of parties when determining stay of execution and the first interested party relies on Machira trading as Machira and company advocates v East African standard[200] KEHC 1167(KLR).



23. Relying on the same case, the first interested party submits that there was inexcusable delay in seeking the order for stay of execution. It is submitted that judgment was entered on the 26th of September 2023 that the present application for stay was brought on 28th June 2024, 9 months after judgment was delivered. No reason has been tendered for the inordinate delay and the only reason that the application was brought was because the auctioneers came knocking at the plaintiff applicant door and execution of the decree was imminent.
24. It is also submitted that the applicant has not offered any security for the due performance of the decree in Kilungu PMCC 292 of 2022. That this would have been a good sign that the applicant is ready and willing to commit to giving security. The first interested party relies on Focin motorcycle company limited v Ann Wambui Wangui and Stephen Kinyua Mugo [2018] KEHC 8358 (KLR).
25. It is submitted that should the court be inclined to grant the stay, then the applicant should be directed to pay half the decretal sum and deposit the other half of the decretal to sum (Ksh 402.797.50) in a joint interest earning account in the names of the interested party and the plaintiff applicants advocate pending the hearing and determination of the present suit.
27. I have carefully considered the application, the submissions by Counsel the rival Affidavits .
28. It is important to note that the application for stay is not brought under order 42 rule 6 as it is not an application for stay pending appeal. Hence the submissions by the first intercede party with respect to compliance with order 42 rule 6 would not be relevant.
29. The circumstances of this case are such that both the applicant and the first interested party rely on the insurance companies to settle the decretal sums. The insurance company for the first interested party paid the decretal sum for the applicant. However, the insurance company for the applicant has not paid its dues . Yet the evidence available is that the applicant had a valid insurance cover at the time of the accident. Hence , the applicant has a triable issue between her and the defendant.
30. So, would it be fair and just to deny the applicant time to pursue the insurance company to settle the decretal of sum?
I do not think so.
31. The application for stay has merit as the defendant has contractual obligations on the basis of the valid insurance policy.
32. It is only fair that the applicant gets to pursue the insurance the insurance company to settle the decretal sum on their behalf .
33. Now in this particular case, the applicant has received a settlement because liability was put at 50 :50 from the insurance company for the first interested party. The amount of money is not disclosed.
34. To be fair to the first interested party, the applicant having received her half of the decretal sum, ought to have made an offer to the 1st interested party pending the settlement by her insurance company.
35. In the interests of justice , I allow the application for stay on condition that the applicant pays to the 1st interested party the sum of Ksh 402, 797/50 from decretal sum she was paid within 30 days hereof. In default the order of stay will lapse.
36. When her part of the claim is settled by her insurer, she will recover from that settlement.
The 1st interested to have costs of this application.
Orders accordingly



DATED, SIGNED AND DELIVERED VIA CTS ON 12TH DAY OF SEPTEMBER 2025.

MUMBUA T MATHEKA

JUDGE

CA Mwanatumu

