



**Musyoki v Amaco Insurance Limited & another (Civil Suit
E012 of 2023) [2024] KEHC 360 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 360 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT E012 OF 2023
HM NYAGA, J
JANUARY 24, 2024**

BETWEEN

DANIEL MUTUA MUSYOKI PLAINTIFF

AND

AMACO INSURANCE LIMITED 1ST DEFENDANT

PATRICK MOSHANJU 2ND DEFENDANT

RULING

1. Vide a Notice of Motion dated 18th July, 2023 brought under Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#), Order 42 Rule 6(2) and Order 50 Rule 1 of the Civil Procedure Rules, 2010, the Applicant seeks for orders that: -
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to grant stay of execution in Nakuru CMCC 1166 of 2019 Patrick Moshanju vs Daniel Musyoka Mutua against the Plaintiff/Applicant pending the hearing and determination of this suit.
 4. That Costs of this Application be in the Cause.
2. The Application is premised on the grounds on its face and supported by an affidavit of the Applicant, Daniel Musyoka Mutua sworn on 18th July, 2023.
3. He deponed that the 2nd Defendant seeks to execute against him and has instructed Sanjomu Auctioneers to proclaim against his goods and that the said Auctioneers have issued a proclamation of attachment dated 12th July, 2023 which is set to lapse on 19th July, 2023.



4. He asserted that the 2nd Defendant intends to proclaim against his goods despite being aware of the statutory obligations of the 1st Defendant in paying and or settling any judgements arising from the court by dint of 3rd party accident claims and that he has also failed to demand payment and or settlement of the decretal award from the 1st defendant in line with the statutory provisions of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act.
5. It was his deposition that he had taken an insurance policy with the 1st respondent under policy Number AM5070/1/109930/18/06 for his Motor Vehicle Registration Number KBU 160B and on 18th October 2018 the applicant's Motor Vehicle was involved in an accident that caused damage to the 2nd Defendant's/Applicant's Motor Vehicle.
6. He averred that and the 2nd Defendant/respondent in Nakuru CMCC 1166 of 2019 Patrick Moshanju vs Daniel Musyoka Mutua instituted suit against him under the doctrine of subrogation wherein Britam Insurance Company sought payment of damages.
7. That despite notification of the existence of the suit in the Subordinate Court, the 1st Respondent failed to represent the interest of its insured, forcing him to seek alternative representation and despite service of a 3rd party notice, the 1st respondent failed to enter appearance in the matter and judgement was entered in favour of the 2nd respondent on 13th January, 2023.
8. He further asserted that despite notice of judgement upon the 1st defendant /respondent of the judgement entered by the court on 1st February 2023 and engagement with representatives of the 1st defendant/respondent seeking that they settle the decretal sum they have failed to settle the outstanding amount.
9. He contended that he stands to suffer immeasurable loss in the event his goods are attached due to failure by the 1st respondent to honour a contractual agreement whereas the 2nd respondent will not suffer any prejudice in the event the orders sought are granted.
10. In opposing the Application, the 2nd Respondent swore a replying affidavit on 6th October, 2017 wherein he deposed that this application is completely confused and muddled up and is for striking out.
11. The 2nd respondent averred that the Applicant's aforesaid Motor Vehicle was involved in an accident with his Motor Vehicle Registration number KBY 560 N Toyota Premio on 18.07.2023 and the Applicant's Motor Vehicle was blamed for the accident.
12. He deposed that he was not party to the contract between the Applicant and the 1st Respondent and therefore the said contract does not bind him at all.
13. He contended that his case before the lower court was a material damage claim and Section 5 and 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* have no application to his suit as the said Sections apply to a case of personal injury and death and not to a material damage claim, and as such he could not enforce his suit against the 1st Applicant by way of declaratory suit.
14. He asserted that the plaintiff has no cause of action against him on both fronts and this court cannot be called upon to challenge or stay a judgement of the Lower Court unless it is by way of Appeal.
15. He urged the court to dismiss the Application.
16. The Application was canvassed through written submissions.



Applicant's Written Submissions

17. On the Substantial loss or prejudice to be suffered, the Applicant submitted that no prejudice shall be suffered by the 2nd Defendant as the intention of this suit is to compel the 1st defendant to uphold its statutory and contractual mandate and as such the 2nd defendant stands to benefit as their claim will be paid by the rightful party while he will suffer substantial loss as his Motor vehicle shall be attached and auctioned if stay is not granted and that furthermore, the court shall have aided the 1st respondent in its continued breach of contract and discharge of its statutory obligations. In buttressing his submissions, the Applicant placed reliance on the case of Ndonge vs Invesco Co. Ltd(Civil Suit No. 23 of 2021)[2022]KEHC 416(KLR) where Justice Odunga (as he then was) while granting stay of execution concurred with the court's reasoning in the case of Charles Makenzi Wambua vs Africa Merchant Assurance Co. Ltd & Another [2014] eKLR where the court inter alia 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 to recoup 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 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 favor...However, the plaintiff has opted to carry that burden on their behalf. If the suit herein is determined in favor 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.”

18. On whether he has established a Prima Facie Case, the Applicant submitted in the affirmative for reason that the 1st defendant has failed to comply with the provisions of section 10 of the Insurance (Motor Vehicle Third Party Risk) Act.

19. He argued that he has established that the said Motor Vehicle was insured by the 1st defendant under Policy Number AM5070/1/109930/18/06 and he should be allowed to prosecute this matter to meet the ends of justice and for the 1st defendant/applicant to abide by its statutory obligations. In bolstering his submissions, he relied on the cases of;

- i. Francis Mwobobia v Invesco Insurance Co. Limited; Mwirigi Muguna Nkoroi (Intended Interested Party/Applicant) [2021] eKLR- where the court held that upon entry of judgment in such accident claims where the Defendant was insured, Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* requires the insurer to settle the decretal amount as awarded and in accordance with the provisions of the Act. It is however not always the case that the insurers willingly settle the claim and this necessitates the filing of a declaratory suit to compel the insurer to settle the decree.
- ii. UAP Insurance Co. Ltd vs Patrick Charo Chiro [2021] eKLR- where the court held that for liability to accrue under section 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the appellant; Secondly, that the respondent has a judgement in his favour against the insured; Thirdly, that statutory notice was issued to the insurer either at least 14 days before



the filing of the suit wherein judgement has been obtained or within 30 days of filing the suit where judgement has been obtained and finally the respondent was a person covered by the insurance policy

- iii. Martin Onyango vs Invesco Assurance Company Limited [2015] eKLR- for the proposition that the details in the Police Abstract as to the details of insurance are in the ordinary cause of events obtained by the police from the Certificate of Insurance affixed to the motor vehicle or are supplied by the insured.
- iv. Philip Kimani Gikonyo vs Gateway Insurance Co. Ltd [2007] eKLR- where the court stated inter alia that “So, if he is deemed to be the “insured” in accordance with the terms of the Policy, and the injured third party here, the Appellant, is a person “entitled to the benefit of the Judgment”, the inevitable conclusion is that the Appellant’s Judgment against the insured’s driver is enforceable against the insurer, the Respondent”

2nd Respondent’s Written Submissions

20. The 2nd respondent submitted that Order 42 Rule 6 of the Civil Procedure Rules is inapplicable in relation to the judgement in Nakuru CMCC NO.1166 of 2019. He nonetheless argued that stay of execution orders are discretionary.
21. He posited that decree holders are not barred from executing a judgement granted in their favor. In support of this proposition, he cited the case of Kassam Hauliers Limited vs Mezgebu Gatachew Mammo [2022] eKLR and Ndonye vs Invesco Assurance Co. Ltd (Civil Suit 23 of 2021) [2022] KEHC 416 (KLR) (5 May 2022).
22. Citing the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR the 2nd respondent argued that lawful execution does not translate to substantial loss.
23. He submitted that stay of execution orders ought to be denied so as to ensure that a successful litigant is not eternally retained in court and that in any event, the present declaratory suit is to be followed up only against the 1st Defendant/Respondent as he is not privy to the contract between the Applicant and the 1st Respondent.
24. He contended that granting stay of execution would only be commending the plaintiff for his continued harassment despite having a valid and regular judgement which has not been appealed against.
25. The 2nd respondent submitted that the applicant has not proved substantial loss. In buttressing his submissions, he relied on the case of Samvir Trustee Limited vs Guardian Bank Limited Nairobi (Milimani) HCCC 795/1997 for the proposition that It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention and the case of Kenya Shell Limited vs Benjamin Karuga Kibiru & Another [1986] eKLR where the court held that in an application for stay of execution, the applicant should show the damages it would suffer if an order for stay is not granted since by granting a stay would mean that status quo should remain as it were before judgment.
26. The 2nd respondent asserted that the ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. In buttressing his submissions, he cited the case of RWW vs EKW [2019] eKLR where the court held as follows: -

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted



right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

27. He submitted that no security has been tendered to safeguard his interest as a successful party. He further argued that the primary suit being a material damage claim is unenforceable vide a declaratory suit and bound to fail to his detriment.
28. He urged this court to dismiss the instant application with costs to him.

Issues For Determination

29. The issues that arise for determination are: -
 - i. Whether material damage claims are covered under the provisions of the *Insurance (Motor Vehicles Third Party Risks) Act*.
 - ii. Whether this court should grant stay of execution of judgement in NAKURU CMCC NO. 1166 of 2019.

Analysis & Determination

30. The 2nd respondent contended that his claim against the Applicant being a material damage claim sections 5 and 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405 is inapplicable in this case.
31. Section 10 (1) of the said Act provides as follows

“Duty of insurer to satisfy judgments against persons insured

 - (1) 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.”
32. Section 5(b) of the same Act provides;

“In order to comply with the requirements of section 4, the policy of insurance must be a policy which insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.



33. In the case of Joseph Mwangi Gitundu vs Gateway Insurance Co. Ltd [2015] eKLR, Gikonyo J. considered the duty of indemnity placed on the insurer under section 10 (1) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405 Laws of Kenya and observed as follows:

“Therefore, under section 10(1) of Cap 405 Laws of Kenya, the insurer has a statutory obligation to 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 obligation is statutory and a strict one; it cannot be shifted or abrogated by a term in the contract of insurance or in the manner proposed by the Defendant, lest the noble intention of the Act to guarantee compensation of third parties who suffer injuries arising from by use of the insured motor vehicle on the road should be lost. Similarly, if the statutory obligation placed by law on the insurer was to be shifted to the insured as proposed by the Defendant, the purpose for taking out an insurance policy and the compulsion by the Act for such insurance cover to be taken out on vehicles to be used on the roads to cover third party risks under Cap 405 Laws of Kenya will also be defeated.”

34. In the instant case, it is uncontroverted that the Applicant took out an insurance policy with the 1st Respondent under Policy Number AM5070/1/109930/18/06 for his Motor Vehicle Registration No. KBU 160 B. The Applicant annexed a copy of the police abstract which shows that the 1st respondent as his insurer. It is undisputed that the Applicant is a Judgement debtor and guided by the above persuasive precedent I am of the view that the 1st Respondent under Section 10 of the aforesaid Act has a statutory obligation to pay the 2nd respondent who is a judgement creditor decretal sum in respect of the liability that arose from by use of the insured motor vehicle on the road.

35. In view of the foregoing, it is my opinion that Said Section 10 of the Act does not exclude a claim in respect to material damage.

36. In regards to the second issue, I note that no appeal has been lodged against the judgment of the lower court. Thus Order 42 Rule 6(2) of the Civil Procedure Rules is inapplicable.

37. In the case of Kassam Hauliers Limited vs Mezgebu Gatachew Mammo [2022] eKLR the court stated as follows: -

“.... The Appellant/ Applicant has also expressly stated that it does not wish to appeal against that Judgment but intends to pursue an application for grant of stay of execution of the Judgment pending the determination of the declaratory suit. In that connection, the provisions of Order 42 Rule 6 of the Civil Procedure rules which apply to an application for stay of execution of a decree subject of an appeal is inapplicable in relation to the Judgment entered on 16th January, 2020”

38. It is undisputed that the Applicant is the Judgment debtor in the aforementioned primary suit while the 2nd Respondent is the decree holder. There is also no dispute that the 1st respondent was the insurer of the Applicant’s suit Motor Vehicle at the time of the accident. The applicant seeks to compel the 1st respondent herein to fulfil its contractual and statutory duty of settling the decretal sum Pursuant to Section 10 (1) of the Insurance Motor Vehicle Third Party Risks) Act.

39. In view of the above provisions, it is patent the Respondent has a statutory obligation to pay the judgment of the third parties unless the liability thereof has been avoided in accordance with the law.



40. However, in my opinion, that statutory right of action does not bar a decree holder from executing the decree issued in his favour against the insured directly. To buttress this point, I will cite two decisions.
41. In *Kassam Hauliers Limited vs Mezgebu Gatachew Mammo* [supra] the court further held that;
- “Given the facts of this case, I take the view that 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. Therefore the Respondent in this case is not barred by the declaratory suit from executing against the Appellant directly.”
42. In *Dolk Limited vs Invesco Assurance Company Limited & 5 Others* [2018] eKLR Odunga, J. (as he then was) similarly held that;
- “.... 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 its favour against the insured directly.”
43. 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.
44. 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.
45. 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 the insured party and any third parties laying claim for compensation. The Act cannot be interpreted to curtail the rights of successful parties holding lawful decrees from realizing the fruits of their judgments.
46. I am thus of the opinion that the plaintiff's case against the 2nd respondent lacks any foundation in law.
47. Given the foregoing, I am also not satisfied that the applicant has established sufficient cause to justify the exercise of this court's discretion in granting the orders sought.
48. It is thus my finding that the application lacks merit and it is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 24TH DAY OF JANUARY, 2024.

H. M. NYAGA

JUDGE

In the presence of;

C/A JENIFFER

Mr. Machoka for Murimi for 2nd respondent

Mr. Aziz Anan for the applicant

