



Osinde v Monarch Insurance Copany Limited (Civil Case E009 of 2023) [2024] KEHC 1420 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 1420 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL CASE E009 OF 2023
TA ODERA, J
JANUARY 24, 2024**

BETWEEN

JOSEPHAT ONGWENYI OSINDE APPLICANT

AND

MONARCH INSURANCE COPANY LIMITED RESPONDENT

RULING

1. The plaintiff /applicant herein filed application dated 14.11.23 s against the defendant /respondent seeking;
 - i. That the application be certified urgentspent.
 - ii. that the execution process commenced against the plaintiff/applicant herein in Kisii CMCC No 232 of 2022 be stayed pending hearing and determination of this is application or in the alternative -----spent
 - iii. That the honourable court be pleaded to issue an interim order of temporary injunction restraining the defendant, it’s servants or agents or otherwise from howsoever manner breaching the policy agreement or statutory duty in respect to the judgment in Kisii CMCC No 272 of 2022 between *Brian Nyangaresi v Josephat Ongwenyi Osinde* (The applicant herein)spent
 - iv. That the Honourable court be pleaded to issue a temporary injunction restraining the defendant from breaching the policy agreement or statutory duty in respect to the judgment in Kisii CMCC No. 272 of 2022 pending hearing and determination of the instant suit.
 - v. Any other order that the court may deem fit to grant.
 - vi. costs be provided for.



2. The application is based on the grounds that;
 - a. The interested party herein obtained judgment and decree in the Magistrate's court against the applicant herein which statutorily ought to be satisfied by the defendant / respondent herein under section 10 of the Insurance (Motor vehicle 3rd party Risks) Act.
 - b. The respondent has failed to satisfy the said decree arising from the accident which is covered under the policy of insurance.
 - c. That execution commenced against the applicant way of attachment of his Motor vehicle registration number KBY 621 A and sale by way of public auction is scheduled for 17.11.23.
 - d. That the plaintiff/ applicant has a prima facie case against the respondent with overwhelming chances of success
 - e. That the plaintiff/ applicant stands to suffer irreparable loss in the event that orders of temporary injunction are not granted as the motor vehicle is his only source of income.
 - f. That the balance of convenience tilts towards granting the injunction.
3. The application is also supported by the affidavit of Ongwenyi Osinde in which he deposes that he is the registered owner of motor vehicle registration number KBY 621 A Toyota NZE (White) which was involved in a road traffic accident on 221.122 along Kisii Kilgoris road at Nyataro area. He said he took out in insurance policy no. KSI0700/000039/2014 which defendant /respondent and the same commenced on 9.4.21 and was to expire on 8.4.22.
4. He also stated that it was an express term of the policy that defendant/ respondent was to cover liability and bodily injury caused to any person arising from the use of the said motor vehicle which is reported to the respondent. The defendant had a duty to defend any resultant suits and satisfy judgments entered against the insured. He told the court that the documents in the suits filed against him were forwarded to the defendant who in turn appointed M/S Onyinkwa and Co. advocates as per bundle of documents annexed as a ,b and c respectively) . further that the said motor vehicle has since been attached and there is a danger of it being sold yet the respondent has a statutory duty to satisfy the decree but has breached he said obligation. He annexed copies of warrants of attachment and notification of sale (JOO2). He said he stands to suffer irreparable loss.
5. The respondent /defendant did not file any response despite service. The application thus proceeded ex-parte
6. I have carefully considered the application, the supporting affidavit together with the annexures and the issues arising for determination are;
 - a. Whether the applicant has satisfied conditions for grant of stay of proceedings
 - b. Whether the applicant has satisfied the conditions for grant of a temporary mandatory injunction.

On the issue of stay of proceedings. The applicant seeks stay of execution proceedings in Kisii CMCC No 272 of 2022 between *Brian Nyangaresi v Josephat Ongwenyi Osinde* (The applicant herein). I have carefully considered the application and the law.



7. The said plaintiff in the primary suit has not been enjoined in this case. In the case of *Britam Insurance Co. Ltd. v Jane Muthoni Mwangi; Kevin Ouma Ochieng & 3 others (interested parties)* [2021] eKLR, the Hon. Justice Gikonyo declined to grant stay of proceedings. The Court held as follows:

“19. It bears repeating that it is necessary that courts should consider two pertinent matters whenever they are faced with this question; (i) the disclaimer suit relate to statutory obligations to pay judgment of third parties; and (ii) orders of stay sought will rudely interrupt the right of third parties to litigate their cases. It, therefore, defeats every sense of justice to conduct such proceedings in the absence of the third parties who will be directly affected by such orders. The interested parties have signified the desire to be in these proceedings as and are accordingly parties.....

21. Be that as it may, the greater constitutional lesson is that an application for stay of proceedings portend serious impediment to the right to fair hearing, access to justice and the expeditious disposal of cases. Courts of law should therefore guard zealously against imposing such impediments except for good cause. Thus, the test is quite stringent for stay of proceedings interferes with a person’s right to litigate his grievances in court expeditiously and without unnecessary interruption. The sole questions is whether it is in the interest of justice to order a stay of proceedings.

interruption. The sole questions is whether it is in the interest of justice to order a stay of proceedings.

The Judge cited *Halsbury’s Law of England*, 4th Edition. Vol. 37 page 330 and 332, where the author states that

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

8. It is clear from the foregoing that stay of proceedings ought to be granted only in exceptional cases where the court is satisfied that the proceedings should not be allowed to proceed. In this case, the lower court case is at the execution stage and the plaintiff/decreed holder therein has a right to enjoy the fruits of his judgment. The issues in the instant suit are purely between the applicant/plaintiff and the defendant respondent. The plaintiff in the lower court thus has nothing to do with this suit. He is also entitled to enjoy the fruits of the judgment entered in his favour and in any event he has not



been enjoined herein and thus staying the proceedings would amount to condemning him unheard. It would thus not be in the interest of justice to stay the proceedings in the primary suit.

9. On whether the plaintiff/applicant is entitled to a temporary mandatory injunction, he seeks that “ That the Honourable court be pleaded to issue a temporary injunction restraining the defendant from breaching the policy agreement or statutory duty in respect to the judgment in Kisii CMCC No. 272 of 2022 Pending hearing and determination of the instant suit”
10. I have seen the prayers in the plaint and prayer (a) seeks a temporary permanent injunction to restrain the defendant from breaching an Insurance policy.
11. It is trite law that mandatory injunctions are granted upon conclusion of a full trial as was held in the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR it was held that:

...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”

12. It is also clear temporary mandatory injunctions are granted in the rarest of cases, where the injury complaint is instant and is likely to cause extreme hardship as was held in the Indian case of *Bharat Petroleum Corp Ltd v Haro Chand Sachdeva*, AIR 2003, cited by Serگون J in the case of *INN v NK* [2020] eKLR Gupta, J. of the Delhi High Court observed as follows:

“While Courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and is likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

13. This case is at an interlocutory stage and parties are yet to be heard on the main suit. The plaint seeks mandatory injunction for defendant to be compelled to satisfy of a decree and the plaintiff /decree holder in the primary suit is also not a party herein.

Prayer of the application is also similar to prayer (a) in the plaint. Though the applicant says his motor vehicle which is his only source of income is in danger of being sold, I have weighed his rights and those of defendant/respondent and the decree holder in the primary suit and I find granting the temporary mandatory injunction as prayed would thus amount to determining the main suit without giving the defendant/respondent and the plaintiff/decree holder in the primary suit a chance to be heard as I have held (Supra).

I therefore find that the application dated 14.11.23 is therefore devoid of merit and I proceed to dismiss it with no orders as to costs. Mention on 9.5.24 for pre-trial directions. Deputy Registrar to notify parties of the date.

T.A ODERA



JUDGE

24.1.24

DELIVERED ON THIS 24TH DAY OF JANUARY 2024.

No appearance for parties

Court Assistant: Oigo

T.A ODERA

JUDGE

24.1.24

