



Chege v Monarchy Insurance Co. Ltd; Njuguna (Interested Party) (Civil Case E019 of 2023) [2024] KEHC 1703 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1703 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE E019 OF 2023
HM NYAGA, J
FEBRUARY 14, 2024**

BETWEEN

AMOS NG'ANG'A CHEGE PLAINTIFF

AND

THE MONARCHY INSURANCE CO. LTD DEFENDANT

AND

NAHASHON NGUGI NJUGUNA INTERESTED PARTY

RULING

History

1. Nahashon Ngugi Njuguna (the interested party) filed suit against Amos Ng'ang'a Chege (the plaintiff) and another in Molo CMCC No.112 of 2020. The said interested party had sought general and special damages for injuries sustained in a road traffic accident on 16th January 2020 along Elburgon -Kapsita road.
2. The Plaintiff herein entered appearance and filed defence. At the conclusion of the trial, judgement was entered against the defendants jointly and severally for a total of Kshs.3,595,905/= less 25% contribution.
3. Thereafter the interested party sought to execute the decree against the plaintiff herein.

The Suit

4. By a plaint dated 5th September, 2023, the plaintiff sued the defendant, who was his suit motor tractor's insurer and joined the interested party to the suit. The plaintiff's case is that at the material time when the accident occurred he had taken out a valid Insurance Policy No. HDO/0811/000012/2018 with the Defendant, covering such persons as specified in the said policy



- in respect of any accident or death by the use of his insured motor tractor registration number KTCB 320P, within the meaning of Section 5 (a) of the *Insurance (Motor Vehicle Third Party Risks/Act)*
5. The Plaintiff averred that it was on term of the said policy that the Defendant would indemnify the Plaintiff in the event of loss or damage or claims arising from a road traffic accident caused or arising from the use of the subject motor tractor.
 6. The Plaintiff further avers that he was sued by the interested party as stated above and as required under the Insurance Policy, he submitted the pleadings to the Defendant, who appointed a firm of advocates to represent him.
 7. The Plaintiff further avers that the judgment entered against him by the Chief Magistrate's Court in Molo is in respect of liability and quantum covered by the Policy issued by the Defendant under Section 5 of the *Act*.
 8. The Plaintiff avers that the Defendant is by law mandated to pay the decretal sum to the interested party.
 9. The Plaintiff also avers that the defendant in compliance with its mandate, issued cheques to the interested party's advocate but for unknown reasons, the interested party instructed auctioneers to proceed and proclaim attachment and sell his goods.
 10. For the above reasons, the plaintiff sought the following prayers:
 - a. A declaration that the Defendant should satisfy the judgment and decree issued on 7th September, 2022 in Molo CMCC No.112 of 2020 arising from the accident of 16th January 2020 involving the plaintiff's motor tractor registration number KTCB 320P together with any charges arising from the executive process of the said decree.
 - b. Costs of the suit
 - c. Any other relief this Honourable Court may deem fit and just to grant.

The Interested Party's Defence

11. The Interested Party filed defence dated 3rd October, 2023. In a nutshell, the interested party avers that he was not privy to the contract between the Plaintiff and the Defendant and that he has been wrongly enjoined (sic) in the suit.
12. The Interested Party further averred that although the Defendant issued cheques in satisfaction of the decree in Molo CMCC No.112 of 2020, the said cheques were dishonoured upon presentation, hence the decree remains unsatisfied.
13. The Interested Party further averred that the suit that has been filed against him is incompetent, frivolous and bad in law.
14. The Defendant did not file any Defence.

The Application

15. By an application dated 5th September, 2023, the Plaintiff/Applicant sought an order that pending hearing and determination of this suit, the Honourable Court be pleased to make an order of stay of execution of the judgment and decree in Molo CMCC No.112 of 2020. The Applicant also sought that the costs of the Application be provided for.



16. The Application is propped by the grounds set out on the face of it and is supported by the affidavit sworn by the Applicant.
17. The Applicant has basically stated what I have already summarised hereinabove.
18. It is the Applicant's averment that unless the stay is granted, he stands to suffer substantial loss, yet he had fully complied with the law and insured his tractor.
19. The Defendant did not file any response.
20. The Interested Party opposed the Application. He also reiterated the averments that I have set out hereinabove.
21. The Application was canvassed by way of written submissions.

Applicant's Submissions

22. The Applicant submitted that the order sought herein are similar to an application for stay pending appeal. That one needs to satisfy the Court that the suit in existence is arguable with high chances of success. On this point, the Applicant cited the decision in *Charles Makenzi Wambua Vs Africa Merchant Assurance Co. Ltd & Another* (2014 eKLR where it was held:

“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.”

23. It is further submitted that the Applicant has proved a prima facie case against the Defendant based on the Act and thus, he should be given a chance to present his case to its logical conclusion. Before the decree in the primary suit is executed. The Applicant cite the decision in *Isaack Wakoli Vs Xplico Insurance Co. Ltd.* (2021) eKLR where the Court held that: -

“The plaintiff's claim against the defendant in the main suit is for declarations that the defendant is bound by the insurance contract entered into with the plaintiff to settle any claim arising from an accident involving the third party herein, which contract is governed by Cap 405, *Insurance Motor Vehicle 3rd Parties Risk Act.*

It is not denied that the plaintiff insured his motor vehicle subject of these proceedings with the defendant and a decree in favor of the interested party herein was passed against the plaintiff.

Under section 10(1) of the *Insurance Motor Vehicle 3rd Parties Risks Act* Cap 405, where the owner of motor vehicle has taken out a policy of insurance which purports to indemnify him



and other authorized persons in respect of liability to third parties intended to be protected under Section 5(b) of the Act for injuries or death to them in the use of the Motor Vehicle on the road; and

- a) a judgment in respect of liability as is required to be covered is obtained against such owner of motor vehicle (the insured);
- b) Then, notwithstanding that the insurer may in accordance with the terms of the insurance contract be entitled to avoid or may even have avoided the policy or liability (under Section 8), or would have restricted or limited the liability as per the terms of the policy (under section 16);
- c) Nevertheless, the insurer is under mandatory statutory liability first to pay the full judgment sum to the persons entitled to the benefits of the judgment (the injured or estate of the deceased); and
- d) Thereafter, the insurer may recover the due sum so paid to the third party under a clause in the terms of the insurance contract, if any under the Act (as per the proviso to Section 8) or a statutory obligation or liability created against the insured under the Act (as per provision to Section 10).”

24. Also cited was the case of New Great Insurance Co. of India vs Lilian Dwellings Cross & Another (1966) E.A. 90 where it was held that: -

“Generally speaking the Act seeks to achieve that object (of making provision against third party risks arising out of the use of motor vehicle on the roads) not by placing the whole burden of compensating third parties injured in accidents on the insurers but by combination of two means namely:

1. By making it obligatory, on pain of punishment, for any person who uses or causes or permits any other person to use a motor vehicle on the road, to have in relation to the user of the vehicle a policy of insurance which satisfies the requirements of the Act, and
2. Restricting the right of insurers to avoid liability to third parties.”

25. It is submitted that the Defendant as an insurer is mandated by law to handle the policy it issued, to avoid a situation where the legal provisions in the Act may not serve their intended purpose.

26. The Applicant referred the Court to the words of Lord Denning in Escoigne Properties Ltd – Vs – I.R. Commissioners (15) [1958] A.C at 565 . It was held thus: -

“A statute is not named in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used, and what the object was, appearing from those circumstances, which parliament had in view.”

27. The Applicant further submitted that it is not in dispute that the Insurance Policy in question was valid and thus the orders sought should be granted. Reference was made to the decision in Xplico Insurance



Co. Ltd Vs Mary Nthambi Mutua (2019) eKLR where the Court cited the decision in [Justus Mutiga & 2 Others Vs Law Society of Kenya & Another](#) (2018) eKLR where the Court of Appeal held that:

“In addition, that limitation goes against the objective of compulsory third party motor vehicle insurance...However, unlike the present system section 10 of the Ordinance imposed a duty on the insurer to compensate fully an insurance claim as raised by the injured third party and as sanctioned by the courts. Where the amount was higher than what was covered by the insurance policy taken by the insured, the insurer was still obliged to fully compensate the injured third party but subsequently recover the excess from the insured. This is what was colloquially referred to as the principle of ‘excess’ in insurance in Kenya. That provision in our view, managed to protect the injured third party while also protecting the interests of the insurer by allowing the insurer to recover from the insured, any excess amount without capping the amount which the insurer could pay as compensation.”

The Applicant also cited the case of [Alois Ochieng Ndege vs. Explico Insurance Co. Ltd. vs. Jane Wachuka Munene \(Interested Party\)](#) (2022) eKLR where it was held that:

“Upon considering the rival positions above, I am of the view that in the circumstances of this case, the plaintiff has reasonably demonstrated the manner in which he stands to suffer substantial loss if an order for a stay of execution is denied. However, it is noteworthy that upon considering the interest of the interested party who already has a judgment in her favor of which she is entitled to enjoy the fruits, it is imperative for the hearing and prosecution of the declaratory suit to be expedited.”

28. Further reference was made to [Njeru Patrick Vs. Invesco Assurance Co. Ltd.](#) (2021) eKLR where the Court stated that:

“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.”

29. Lastly, the Applicant cited the case of [Francis Mwobobia Vs Invesco Insurance Co. Ltd.](#) (2021) eKLR where the Plaintiff in the primary suit sought to be joined in the declaratory suit. The Court held that:

"Duty of insurer to satisfy judgments against persons insured

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.



Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in Section 5 (b) prescribed in respect thereof in the Schedule.

Upon entry of judgment in such accident claims where the Defendant was insured, the above provisions require 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. Ordinarily, such declaratory suits are filed by the Defendant and/or Judgment Debtor in the primary suit.”

Respondent (Interested Party) Submissions.

30. It was submitted that the Interested Party was wrongly joined to this suit as it is not privy to the Insurance contract between the Plaintiff and the Defendant.

31. The Interested Party, concurring with the Applicant stated that the Application ought to meet the threshold for grant of stay, namely sufficient cause, substantial loss, furnishing of security and the making of the Application without unreasonable delay. Cited was the case of [Elena Doudelado Lava Korir Vs. Kenyatta University](#) (2014) eKLR where the Court had this to say: -

“The Application must meet a criteria set out in precedent and the criteria is best captured in the case of *Halai & Another v Thorton & Turpin (1963) Ltd* [1990] KLR 365 where the Court of Appeal Gicheru JA, Chesoni & Cockar Ag. JA (as they all were) held that:-

The High Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly the applicant must establish a sufficient cause, secondly the court must be satisfied that substantial loss would ensue from a refusal to grant stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”

32. It is submitted that the Applicant has not demonstrated the substantial loss he will suffer. It is also pointed out that no appeal has been filed against the decision that the Applicant execution stayed.

33. It is further submitted the Application was filed after ordinate delay of one year after the judgment was delivered in the primary suit.

34. It is argued that allowing the Application will cause mental anguish to the Interested Party who has a valid judgment which has not been appealed against. Counsel referred me to [Kassam Hauliers Ltd Vs Mezgebu Gachew Mamma](#) (2022) eKLR.

35. The Respondent referred the Court to the following decisions:- -

a. [Dollk Limited Vs Invesco Assurance Co. Ltd. & Others](#) (2018) eKLR where it was held that: -

“It follows that this suit does not meet the test of a subrogation suit. 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.”



- b. [*Jane Wanjiru Mwangi Vs. Xplico Insurance Co. Ltd. & Another*](#) (2021) eKLR where the Court held that: -

“It is clear from the motion that the order sought is that a stay of execution of the judgment in the primary suit pending the hearing of the declaratory suit and that the said motion is predicated on the provisions of Sections 1A & 1B, 3, 3A and 63 (e) of the [*Civil Procedure Act*](#); Article 159 (2) of [*the Constitution*](#); and Order 51, Rules 1, 3 and 4 of the *Civil Procedure Rules*.

Upon consideration of the cited provisions, I observed that none of them necessarily cater for a situation touching on a stay of execution of a decree pending the hearing and determination of an entirely new suit.

It is apparent the applicant is seeking a declaratory judgment against the defendant, her alleged insurer, and not against the interested party. It is also apparent that the judgment delivered in the primary suit has not been challenged by way of an appeal or review.

That notwithstanding, I find that while the applicant is entitled to file a declaratory suit against the defendant pursuant to the provisions of the [*Insurance \(Motor Vehicles Third Party Risks\) Act*](#), in a bid to have the insurer settle any pending claims arising out of an insurance policy entered into between an insurer and its insured, this does not necessarily bar a decree holder from pursuing the decretal sum from an insured person, such as the applicant in this instance. This position is supported by the case of Peter Kilonzo Kioko v Monarch Insurance Co. Ltd; Kisakwa Ndolo King`oku (Sued as Legal Representative of the [*Estate of Mwanika Kisakwa - Deceased \(Interested Party\)*](#)) [2021] eKLR in which the court determined thus:

“The applicant herein is not seeking judgment against the interested party. It is seeking judgment against its insurer, the Defendant. There is no judgment which the insurer has obtained against the applicant which is sought to be stayed in these proceedings...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 his favour against the insured directly.”

I am convinced that even after the applicant herein satisfies the decretal sum in the primary suit, she can still pursue the present declaratory suit against the defendant and seek compensation therefrom. In my view, it would not be in the interest of justice to hinder the respondent from realizing the fruits of his judgment.”

- c. [*Buzeki Interprises Ltd Vs African Merchant Assurance Ltd*](#) (2021) eKLR where the Court held that:

“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:

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 Ong'ondo, 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.”

- d. *Stephen Amollo Odhiambo Vs Monarch Insurance* (2022) KEHC 15610 (KLR) where 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.

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.”

Analysis and Determination

36. The issues for determination are:



- a. Whether the interested party was properly joined to the suit.
 - b. Whether there are sufficient grounds adduced to grant a stay of execution
37. As seen from the cited cases, there has been a lot of litigation over the issue now before this Court. What is clear is that there is a variance of findings by the High Court. Some courts have found merit in such applications while others have not.
38. Section 5 of the *Act* in question obligates all vehicles classified under the Act to take out insurance against liability by 3rd parties. The section reads as follows:
- “In order to comply with the requirements of section 4, the policy of insurance must be a policy which—
- (a) is issued by a company which is required under the *Insurance Act*, 1984 (Cap. 487) to carry on motor vehicle insurance business; and
 - (b) 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 the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.”
40. Section 10(1) of the *Act* obligates an Insurance Company to compensate any 3rd party injured or dies as a result of any accident including its insured. It reads 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.”
39. It is pursuant to this provision that the Defendant insured the Plaintiff under the policy between them.
40. In my opinion, the law provides for the requirement that such a cover be taken out. The cover, once issued, becomes a contractual agreement between the insurer and the insured, in this case the defendant and the plaintiff herein. Therefore the interested party has no role to play in a dispute between the Plaintiff and Defendant.
41. It is my opinion, and in agreement with the decisions in *Dollk Ltd vs Invesco Assurance Company Limited (supra)*, *Jane Wanjiru Mwangi vs Xplico Insurance Company Limited (supra)*, *Jennifer Anyango Oloo vs Buzeki Enterprises Limited (supra)* and *Odhiambo vs Mornach Insurance Co. Limited (supra)*. In doing so I do respectfully disagree with my sister and brother judges who have held views to the contrary. The Plaintiff on his own has the right to file a declaratory suit against the Insured company. He cannot, in that suit, seek to join the Insured who he had sued in the primary suit. The issues between the Plaintiff and the Interested Party were determined in the primary suit and cannot



be canvassed again. By the same analogy, I find that the Interested Party has no business in the suit between an Insurer and Insured.

42. Looking at the Complaint, there is no prayer sought against the interested party. The sole prayer is against the Defendant who has conveniently and to no surprise, failed to enter appearance or file any defence.
43. Courts must be wary of suits of this nature which have become a common occurrence. It is very likely that an insurer and an insured can collude to file a suit of this nature. Once stay is granted, the Interested Party has nowhere to turn to. He/she has no control of the suit between the plaintiff and defendant.
44. The primary responsibility of settling a decree lies with the party against whom it is issued. Dragging the Interested Party to this suit was, in my opinion, improper.
45. The next question is whether a stay ought to issue as prayed.
46. This is not an appeal against the decision in the primary suit. I don't see how a defendant can file a fresh suit and seek to stay another suit from which he never appealed.
47. I agree that Section 5 of the Act is meant to protect the insured and the 3rd party. What I don't agree with is that the said section can be used by an insured to stay a decree issued against him. He should satisfy the decree and then seek compensation from its insurer.
48. 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.”

49. I still stand with the said decision. If such applications are to be allowed, then it is very conceivable that no judgment and decree arising out of an accident covered by an insurance company will ever be executed. Is this what the Act had in mind? I do not think so.
50. Perhaps it is time for the issue to be determined by the Court of Appeal or even the Supreme Court, so that the varying decisions can be streamlined.
51. For now, I find that the Application lacks any merit and it is dismissed with costs to the Interested Party.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 14TH DAY OF FEBRUARY, 2024.

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H. M. NYAGA

JUDGE

In the presence of;

C/A Dickson

Mr. Alusa for Applicant

Mr. Gekonga for Respondent.

