



Mwaura v Invesco Assurance Company Ltd; Musyoka (Suing as Legal Representative of the Estate of Raphael Mwanzia Mutua - Deceased) & 2 others (Interested Parties) (Civil Case E183 of 2023) [2024] KEHC 1358 (KLR) (Civ) (16 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1358 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE E183 OF 2023

AN ONGERI, J

FEBRUARY 16, 2024

BETWEEN

JOHN MWAURA APPLICANT

AND

INVESCO ASSURANCE COMPANY LTD RESPONDENT

AND

MWEKE MUSYOKA (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF RAPHAEL MWANZIA MUTUA - DECEASED) INTERESTED PARTY

EMBASSAVA COOPERATIVE SOCIETY AND CREDIT SOCIETY LIMITED INTERESTED PARTY

EPHANTUS GITHUA MWANGI INTERESTED PARTY

RULING

1. The application coming for consideration in this ruling is the one dated 30/10/2023 seeking the following orders;
 - i. That this application be certified urgent and be heard ex-parte in the first instance and inter-partes hearing be as the court may direct.
 - ii. That pending the hearing and determination of this application inter-parties there be a stay of execution of the judgment and decree and all consequential orders and/or proceedings arising from Milimani Chief Magistrate Civil Case number 12240 of 2021.
 - iii. That in the and determination of this application inter-parties.



- iv. That the warrants of attachment and sale of moveable property issued to Icon Auctioneers in execution of a decree for money be set aside pending the hearing and determination of the declaratory suit herein.
 - v. That the costs of this application be provided for.
2. The application is based on the following grounds;
- i. The applicant herein is a member of the 2nd Interested Party and the 3rd Interested Party is the applicant's driver/employee.
 - ii. In the year 2016 the applicant applied for a facility from National Industrial Credit Bank Limited through the 2nd Interested Party to purchase motor vehicle registration no. KCJ 712M.
 - iii. That the loan was approved by National Industrial Credit Bank and the motor vehicle was jointly registered under the said bank and the 2nd Interested Party on behalf of the applicant herein.
 - iv. That on 7th April 2019 the applicant's motor vehicle registration no. KCJ 712M was involved in a fatal road accident and the 1st interested party herein filed Chief Magistrate Civil Case number E12240 of 2021 on behalf of the deceased's estate.
 - v. That at the time of the said accident the applicant's said motor vehicle was duly insured by the respondent herein under policy number 015/0804/1/060988 and on 12th April 2019 the 3rd Interested Party filled a motor accident report form and submitted the said form to the respondent as was required.
 - vi. That the applicant upon being served with summons and pleadings of the said suit notified the respondent who acknowledged receipt of the same and even asked the applicant to pay excess fee as the applicant's contribution to the claim.
 - vii. On 11th April 2023 judgment was entered against the 2nd Interested Party herein in Milimani CMCC No. E12240 of 2021, warrants of attachment and sale were issued to Icon Auctioneers on 28th September 2023 and on 17th October 2023 the motor vehicle registration no. KCJ 712M was attached in execution of decree or the judgment amount.
 - viii. That since 17th October the applicant has visited the respondent's offices severally but the respondent has refused to settle the judgment amount or take any steps to prevent the sale of the applicant's said motor vehicle.
 - ix. That there is need for the court to stay an execution pending the hearing and determination of this application and the declaratory suit herein.
 - x. That the applicant is the sole breadwinner in his family and he is still servicing the loan from National Industrial Credit bank.
 - xi. That in the interim there is need for motor vehicle number KCJ 712M to be released to the applicant on a running attachment basis pending the hearing and determination of this application inter-parties to enable the applicant to be able to service his loan from National Industrial Credit Bank and provide for his family.
3. The application is supported by the affidavit of JOHN MWAURA and which he deposed he is a member of the 2nd Interested Party and the 3rd Interested Party was his driver/employee.



4. That in the year 2016 he applied for a facility from National Industrial Credit bank Limited through the 2nd Interested Party to purchase motor vehicle registration no. KCJ 712M.
5. That the loan was approved by National Industrial Credit bank and the motor vehicle was jointly registered under the said bank and the 2nd Interested Party on his behalf.
6. That on 7th April 2019 the motor vehicle registration no. KCJ 712M was involved in a fatal road accident.
7. That at the time of the said accident, the said motor vehicle was duly insured by the respondent herein under policy number 015/0804/1/060988 and on 12th April 2019 the applicant's driver filled a motor accident report form and submitted the said form to the respondent as was required of him.
8. That the 1st Interested Party herein filed Chief Magistrate Civil Case number E12240 of 2021 on behalf of the deceased's estate and upon being served with summons and pleadings of the said suit the applicant notified the respondent who acknowledged receipt of the same and even asked the applicant to pay excess fee of Kenya shillings thirty thousand (shs.30,000/=) as the applicant's contribution to the claim.
9. On 11th April 2023 judgment was entered against the 2nd Interested Party herein in Milimani CMCC no. 12240 of 2021, warrants of attachment and sale were issued to Icon Auctioneers on 28th September 2023 and on 17th October 2023 the applicant's motor vehicle registration no. KCJ 712M was attached in execution of decree for the judgment amount.
10. That since 17th October 2023 the applicant has visited the respondent's offices severally but the respondent has refused to settle the judgment amount or take any steps to prevent the sale of the my said motor vehicle.
11. That there is need for the court to stay any execution pending the hearing and determination of this application and the declaratory suit herein.
12. That the applicant is the sole breadwinner in his family and he is still servicing the loan from National Industrial Credit Bank and in the interim there is need for motor vehicle number KCJ 712M to be released to the applicant on a running attachment basis pending the hearing and determination of this application inter-parties to enable the applicant to be able to service his loan from national Industrial Credit Bank and provide for his family.
13. The interested party's Advocate filed an affidavit in which he deposed he is an advocate of the High Court of Kenya having conduct of this matter for the 1st Interested Party and the plaintiff in Millimani MCCC E12240/2021 conversant with the facts herein.
14. That the prayers sought in the application have been overtaken by events as the subject matter motor vehicle registration number KCJ 712M was sold on the 26th October 2023 which was four days before filing of the application.
15. That the subject matter motor vehicle registration number KCJ 712M was advertised for sale on the Standard Newspaper dated 18th October 2023 to be sold on the 26th October 2023.
16. That the applicant was served with the notification of sale on the 17th October 2023 when the subject motor vehicle was attached in the presence of the driver.
17. That the applicant was served with the proclamation on the 7th of October 2023 which was received by the driver.



18. That the applicant was served with all necessary documentation before the sale of the subject matter motor vehicle and only made the application on the 30th October 2023, four days after the sale.
19. That equity aids the vigilant not the indolent and in the foregoing circumstances, the ex-parte orders ought to be set aside and application be dismissed with costs.
20. The defendant/respondent did not oppose the application.
21. The applicant and the Interested Party submitted as follows.
22. The applicant on one part contend that the key issue in dispute concerns the auction of the subject motor vehicle. According to the applicant, the Interested Party did not meet the burden of proof standard set out in Sections 109 and 110 of the Evidence Act, Cap. 80 Laws of Kenya; since the burden of proof lay with the latter at all material times, to prove that the sale of the subject motor vehicle took place by way of a public auction as claimed, or at all.
23. The applicant further contended that he has satisfied the conditions set out in the renowned case of *Giella v Cassman Brown* [1973] E.A 358 on the grant of an interlocutory injunction through the stay order sought herein. In particular, the applicant argued that he has established a prima facie case against the respondent since the sale of subject motor vehicle is imminent; he has further demonstrated that unless the stay of execution order sought is granted, he stands to suffer irreparable loss/damage arising out of his inability to recover the subject motor vehicle upon its sale.
24. The applicant therefore urged the court to consider the authority of *Apollo Ogunda v Africa Merchant Assurance Co. Ltd & 4 others* [2015] eKLR where a similar application was allowed on the premise of fairly similar facts and circumstances to those presently before this court. Consequently, the applicant urged the court to allow the application on those grounds.
25. On the other part, the 1st interested party submitted that foremostly, the applicant has no locus standi in the instant proceedings since the subject motor vehicle; which has since been sold; was registered in the name of the 2nd interested party at all material times. That the applicant has not tendered any evidence or material to show that he is acting as a representative of the 2nd interested party. That resultantly, he is not deserving of the orders sought in the present application.
26. The 1st interested party further maintained that the subject motor vehicle was previously sold by way of a public auction and hence the matter has been overtaken by events. For those reasons, the court was urged to dismiss the application, with costs to the 1st interested party.
27. In his brief rejoinder, the applicant reiterated his earlier argument that he has at all material times been a member of the 2nd interested party and that he is equally the registered owner of the subject motor vehicle, contrary to the averments being made by the 1st interested party.
28. The applicant therefore argued that he has locus standi in the application currently before this court.
29. The sole issue for determination is whether the motor vehicle should be released on a running attachment.
30. I find that the application has been overtaken since the motor vehicle had already been sold by the time the applicant approached this court seeking for orders that in the interim the motor vehicle registration number KCJ 712M be released to the applicant on a running attachment basis pending the hearing and determination of this suit.
31. It has not been disputed that the motor vehicle registration number KCJ 712M was sold on the 26th October 2023 which was four days before filing of this application dated 30/10/2023.



32. However, the applicant who has now filed this declaratory suit against the respondent is not without recourse. In the circumstances, I dismiss the Application dated 30/10/2023 with no orders as to costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF FEBRUARY, 2024.

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A. N. ONGERI

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent

