



Kinyua v Invesco Assurance Company Ltd; Nderitu (Interested Party) (Commercial Case E208 of 2023) [2024] KEHC 2673 (KLR) (Commercial and Tax) (1 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2673 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E208 OF 2023
MN MWANGI, J
MARCH 1, 2024**

BETWEEN

GEORGE NJENGA KINYUA PLAINTIFF

AND

INVESCO ASSURANCE COMPANY LTD DEFENDANT

AND

LUCY WANJIRU NDERITU INTERESTED PARTY

RULING

1. For determination is the plaintiff's Notice of Motion application dated 15/5/2023 brought under Sections 1A, 1B, 3A and 6 of the [Civil Procedure Act](#) and Order 42 Rule 6(2) and Order 51(1) of the [Civil Procedure Rules](#), 2010. The plaintiff seeks stay of execution proceedings in Nyahururu PMCC No. 35 of 2019 and the costs of this application.
2. The grounds of the application are that the plaintiff was the lawful owner of motor vehicle registration No. KCA 568N and had insured the said vehicle with the defendant. That the terms of the policy were that the defendant would indemnify the plaintiff from claims arising from third parties in respect of among other things, bodily injuries in accidents caused by the said vehicle, offer legal representation and settle judgments entered against the plaintiff in legal suits filed by third parties.
3. The plaintiff averred that the suit motor vehicle was involved in an accident whereby the interested party was injured and subsequently filed Nyahururu PMCC No. 35 of 2019 and judgment was entered in her favour in the sum of Kshs.2,458,179.00.



4. The plaintiff stated that the defendant has neglected and/or declined to pay the balance of Kshs.1,339,659.00 of the decretal sum, and as a consequence thereof, the interested party applied and obtained a warrant of arrest dated 5/5/2023 against the plaintiff.
5. The plaintiff's case is that the defendant has a legal duty to settle the decretal sum in the suit in the lower Court as stipulated in the insurance contract. The plaintiff contended that pending determination of which party should pay the decretal sum between the insured and the insurer, stay of execution ought to be issued.
6. The interested party opposed the application through a replying affidavit sworn on 22/6/2023 by herself. She averred that she filed a suit against the plaintiff in the lower Court and judgment was delivered on 10/3/2021. That since the date of the said judgment on 10/3/2021, the plaintiff did not make any payment towards it, which necessitated her Advocate to institute execution proceedings against him.
7. The interested party deposed that the plaintiff was not compliant during the execution proceedings which led him to be committed to civil jail on 29/9/2022, but the plaintiff and defendant entered into a consent to the effect that the plaintiff would be released from civil jail and would liquidate the balance of the decretal amount in monthly instalments of Ksh.200,000/-.
8. The interested party averred that the plaintiff failed to comply with the consent and instead rushed to this Court to seek stay of execution orders. The interested party asserted that she is not privy to the contract between the plaintiff and defendant and prayed to have the instant application dismissed with costs and for the execution process to be allowed to proceed, or in the alternative, if the Court is inclined to grant the orders sought in the application, the plaintiff should be ordered to pay the balance of the decretal amount and continue to sort out its issues with the defendant separately.

Analysis And Determination.

9. The plaintiff and interested party canvassed their respective positions through written submissions which this Court has considered. The plaintiff's submissions are dated 8/8/2023, whereas the interested party's submissions are dated 29/9/2023.
10. The issue for determination is whether this Court ought to grant a stay of execution in Nyahururu PMCC No. 35 of 2019 pending the determination of this suit.
11. The record shows that judgment was entered against the plaintiff in favour of the defendant in Nyahururu PMCC No. 35 of 2019 wherein the plaintiff was ordered to pay the sum of Kshs.2,458,179.00 to the interested party. The defendant as the plaintiff's insurer paid part of the decretal sum amounting to Kshs.1,300,000/-. This is evident from the letter dated 9/3/2023 from the defendant to the plaintiff's Advocates indicating that payment to the tune of Kshs.1,300,000/- was made. In the said letter, the defendant promised to continue settling the outstanding amounts in the decree. The letter is marked "G.N.K 3" and attached to the plaintiff's supporting affidavit.
12. The dispute before this Court relates to the fact that the balance of the decretal amount has not been paid to the interested party who has taken out execution proceedings against the plaintiff.
13. While it is true that an insurance contract exists between the plaintiff and defendant and the defendant ought to indemnify the plaintiff in payment of the balance of the decretal sum, I note that a consent was entered into between the plaintiff and the interested party whereby the plaintiff agreed to pay the outstanding decretal sum of Ksh.1,478,176.00 in instalments of Ksh.200,000/- per month. The consent is marked "LWW6" in the interested party's replying affidavit.



14. It was agreed in the said consent that the monthly instalments would be paid from 22/10/2022 and in default of payment, the plaintiff would be re-arrested and re-committed to civil jail.
15. The consent is a binding agreement between the parties who executed it, and stipulates how the outstanding decretal amount would be paid by the plaintiff in his personal capacity and not by his insurer. The interested party is not privy to the insurance contract between the plaintiff and defendant and is only concerned with executing the judgment against the plaintiff.
16. In regard to the binding nature of consent orders, the Court of Appeal affirmed in *S M N v Z M S & 3 Others* [2017] eKLR that:

“There is now no dearth of authorities on the law governing the setting aside of consent Judgments or orders, and we are grateful to counsel for citing some of them before us. Generally a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties.”
17. In *Gideon Musyoka Ndambuki v Housing Finance Company of Kenya Ltd* [2020] eKLR, Majanja J stated the following on the issue of consent orders:

“The issue as I see it is whether the court can vary the Consent Order recorded by the parties. A consent order is in the nature of a contract and as the Court of Appeal stated in *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited and Another* NRB CA Civil Appeal No. 95 of 1999 [2001] eKLR, ‘A court of law cannot re-write a Contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. It follows then that a consent order can only be set aside on the same grounds that would be available to invalidate or vary a contract.’”
18. I do not find any justifiable reason to interfere with the execution proceedings in the lower Court. The plaintiff is liable to pay the balance of the decretal sum to the interested party in accordance with the judgment of the lower Court and the consent order. The plaintiff’s recourse lies in pursuing the defendant to compensate it. The upshot is that this Court declines to stay the execution proceedings in Nyahururu PMCC No. 35 of 2019.
19. The instant application is found to be devoid of merits and it is dismissed with costs being granted to the interested party.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF MARCH, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Muindi for the plaintiff/applicant

Ms Mureithi for the interested party/respondent

Ms B. Wokabi – Court Assistant.

