



**Mwangi & another v Murimi & 2 others (Miscellaneous Civil Application
E012 of 2024) [2024] KEHC 5433 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5433 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS CIVIL APPLICATION E012 OF 2024**

FN MUCHEMI, J

MAY 2, 2024

BETWEEN

MARK MWANGI 1ST APPLICANT

EASTLEIGH ROUTE SACCO LIMITED 2ND APPLICANT

AND

SIMON MWITI MURIMI 1ST RESPONDENT

**XPLICO INSURANCE COMPANY LIMITED (UNDER STATUTORY
MANAGEMENT) 2ND RESPONDENT**

POLICYHOLDERS'S COMPENSATION FUND 3RD RESPONDENT

RULING

Brief facts

1. The application dated 30th January 2024 seeks for orders of leave to institute a declaratory suit against the 2nd respondent seeking for issue of declaratory orders that Xplico Insurance Company Limited (Under Statutory Management) is liable to settle the full decretal amount and the costs of the suit arising from Thika MCCC No. 238 of 2021 *Simon Mwiti Murimi v Mark Mwangi & Others*.
2. The 1st respondent in its a Replying Affidavit sworn on 20th February 2024 opposed the application.

Applicants' Case

3. The applicants state that they were issued with a third party motor vehicle insurance policy cover number XPI/00001xxxxx and certificate number A972xxxx or motor vehicle registration number KCJ 218Q. The insurance policy was valid for a period between 9th July 2020 to 8th August 2020 whereas the accident occurred on 10th July 2020.



4. The applicants state that in Thika MCCC No. 238 of 2021, *Simon Mwiti Murimi v Mark Mwangi & Others*, the applicants lodged a third party notice as against the 2nd respondent herein to be joined as third party to facilitate the determination of liability and to seek indemnity or contribution thereof. The trial court granted the application for request for judgment against the 3rd party on 31st January 2023 after the 2nd respondent failed to enter appearance or file a defence. The applicants contend that the 1st respondent herein served them through Messrs Braifus Auctioneers with a notice of warrants of Attachment of moveable property in execution of the decree dated 23rd November 2023 with the intention that it will attach the applicants' properties in execution thereof.
5. Pursuant to a notice published and circulated in the Insurance Regulatory Authority website, the 2nd respondent was placed under statutory management and the 3rd respondent was appointed the statutory manager of the 2nd respondent. The applicants however state that the 3rd respondent failed to exercise its powers to declare a moratorium pursuant to section 67C (10) of the *Insurance Act* subjecting them to the risk of attachment of their personal properties in satisfaction of the decree issued in Thika MCCC No. 238 of 2021.
6. The applicants therefore urge the court to order an immediate stay of execution of the decree dated 23rd November 2023 and the proclamation of attachment thereto. The applicants argue that the application is highly merited and any prejudice which shall be suffered by the respondents can be mitigated by way of costs.

The 1st Respondent's Case

7. The 1st respondent opposes the application on the premise that it is misconceived, vexatious, frivolous, an abuse of the court process and legally untenable as it is not hinged on any suit or appeal and therefore ripe for striking out.
8. The 1st respondent further states that the entire application is premised on the wrong provisions of the law and seeks to stay execution of a judgment that has not been challenged nor appealed against making it an application with the sole aim of frustrating the realization of fruits of his judgment.
9. The 1st respondent contends that the instant application is a regurgitation of an earlier application made at the subordinate court by the applicants who sought to join the 2nd & 3rd respondents as third parties but the application was dismissed and the decision has never been appealed against to date.
10. The 1st respondent states that the applicants have not given any reasons why they should be excused from satisfying the decree in Thika CMCC No. 238 of 2021 yet no appeal has been preferred against the said judgment and there is no proposal on how settlement is to be done. Thus, the 1st respondent argues that the auctioneers were obligated to proceed to execute the decree on the lapse of stay of execution period as the applicants had neither made any proposals on settlement nor settled the decree. As such, the 1st respondent contends that the application is misguided, mischievous and solely aimed at escaping satisfaction of the decree in his favour and more specifically to bastardize a legitimate decree and judgment rendered by a competent court.
11. The applicants filed a Further Affidavit and deposed that they are fully aware of their right to appeal the judgment delivered on 23/11/2023 however they have elected to proceed by filing a declaratory suit to compel the 2nd respondent to settle the decretal amount owed to the 1st respondent. Further, the applicants contend that the 1st respondent has not rebutted that at the time of the accident, they had a valid insurance policy number XPI/00001xxxxx for motor vehicle registration number KCJ 218Q. The applicants thus state that the 1st respondent is approbating and reprobating by deposing that they



are undeserving of the legal remedies enshrined under the *Insurance (Motor Vehicles Third Party Risk) Act* Cap 405 whereas the 1st respondent invoked the same provisions of the Act to prosecute his case in the lower court.

12. Parties put in written submissions however the respondents did not file their submissions despite been given seven (7) days to do so.

The Applicants' Submissions

13. The applicants submit that the 1st respondent suffered bodily injuries hence the claim is covered under Section 5 of *Cap 405*. Furthermore, the 1st respondent notified the 2nd respondent of the intended action for recovery of general and special damages in respect of the accident which occurred on 10th July 2020 by serving them with a statutory notice.
14. The applicants cite Clause 5 of the public notice dated 8th December 2023 by the Commissioner of Insurance and Section 179(1) of the *Insurance Act* and submit that the provisions are couched in mandatory terms for the protection of policy holders for insurance companies which have been placed under statutory management.
15. The applicants submit that despite the 1st respondent serving the 2nd respondent with the statutory notice, the 2nd respondent did not enter appearance nor file a defence. The applicants believe that their appearance would shed more light on the matters at hand. Nonetheless, the applicants contend that the 3rd respondent did not slack in its responsibility of protecting Xplico's policy holders by issuing a moratorium for a period of 12 months pursuant to Section 67C of the *Insurance Act*.
16. The applicants rely on Section 10 of the *Insurance (Third Party Motor Vehicle Risks) Act* Cap 405 and the case of *Joseph Mwangi Gitundu v Gateway Insurance Co. Ltd* [2015] eKLR and submit that the intended declaratory suit will ensure that the 1st respondent's claim in Thika CMCC No. 238 of 2021 will be settled.

The Law

Analysis and Determination.

17. It is not disputed that the 1st respondent instituted a case in the trial court being Thika CMCC No. 238 of 2021 against the applicants following a road traffic accident which occurred on 10th July 2020 between the 1st respondent and the applicants' motor vehicle registration number KCJ 218Q. The trial court entered judgment on 23rd November 2023 in favour of the 1st respondent as against the applicants finding the applicants 100% liable and awarding the 1st respondent general damages for pain, suffering and loss of amenities at Kshs. 1,200,000/- and special damages at Kshs. 3,000/-. The applicants had enjoined the 2nd respondent as a third party in the suit and the trial court in delivering its judgment dismissed the suit of the third party. The applicants thus seek the leave of this court to file a declaratory suit against the 2nd & 3rd respondents to compel them to settle the decretal amount of Kshs. 1,384,800/-.
18. Evidently the applicants have not filed an appeal on the said decision of the trial court. However what is not clear is why the applicants have filed the miscellaneous application in the instant court. The applicants claim that the 2nd respondent insured their motor vehicle vide insurance policy cover number XPI/00001xxxxx and certificate number A972xxxxx. Furthermore it is not disputed that the 1st respondent served the 2nd respondent with a statutory notice when he instituted the suit in the trial court. Therefore pursuant to Section 10 of the *Insurance (Motor Vehicle Third Party Risks) Act*, the 2nd respondent is under a duty to satisfy judgments against persons insured except when the insurance



company has repudiated the claim as provided for in Section 10(2) &(4) of the Act. Thus, in the absence of such repudiation the insurer is liable to satisfy the judgment and decree. Furthermore, the 2nd respondent is under statutory management and according to the applicants there is a moratorium in place. Thus, the applicants ought to have informed the trial court in CMCC No. 238 of 2021 of the existence of the moratorium and seek that the orders be complied with by way of stay in the lower court proceedings instead of filing the instant application. There is already stay of proceedings by virtue of the moratorium in place and the applicants ought to have approached the trial court and argue their right of protection by the orders already issued pursuant to the moratorium.

19. Thus, the magistrate's court is possessed of the requisite jurisdiction to deal with the said issues as the applicants are not appealing the decision of the trial court. Accordingly, the application dated 30th January 2024, is misconceived and improperly before this court is hereby struck out with costs to the respondents.

20. It is hereby so ordered.

RULING DELIVERED, DATED AND SIGNED THIS 2ND DAY OF MAY 2024 AT THIKA

F. MUCHEMI

JUDGE

