



**Nyareru v Jubilee Allianz Insurance (K) Ltd; Mwihia (Interested Party) (Civil Case E195 of 2023) [2024] KEHC 6114 (KLR) (Civ) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6114 (KLR)

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

**CIVIL  
CIVIL CASE E195 OF 2023**

**AN ONGERI, J**

**MAY 24, 2024**

**BETWEEN**

**SARAH NYAMBEKI NYARERU ..... PLAINTIFF**

**AND**

**JUBILIEE ALLIANZ INSURANCE (K) LTD ..... DEFENDANT**

**AND**

**SHEILA GATAKA MWIHIA ..... INTERESTED PARTY**

**RULING**

1. The application coming for consideration in this judgment is the one dated 17/11/2023 brought under Order 22, rule 22 and rule 52 of the *Civil Procedure Rules, 2010* and Section 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, Sections 5 & 10 of the *Insurance (Motor Vehicle Third Party Risks) Act*, the Inherent Jurisdiction of the Court and all other enabling provisions of the Law seeking the following orders:
  - i. Spent.
  - ii. That pending the hearing and determination of this application inter partes there be stay of execution of the judgment and decree of the Small Claims Court in the primary suit: Milimani SCCC No. E1189 of 2022 Sheila Gataka Mwihia vs Sarah Nyambeki Nyareru
  - iii. That pending the hearing and determination of this Suit there be stay of execution of the judgment and decree of the Small Claims Court in the primary suit: Milimani SCCC No. E 1189 of 2022 Sheila Gataka Mwihia vs Sarah Nyambeki Nyareru.



- iv. That costs of this Application be provided for.
2. The application is based on the following grounds;
  - i. That at all times material to this suit, the Plaintiff was in control of Motor Vehicle Registration No. KAS 056B Volkswagen Jetta.
  - ii. That by a Policy of Insurance particulars; C/No C175302316 P/No P/101/1002/2018/001019/ TPO issued to the Plaintiff by the Defendant, and in consideration for the payment of insurance premiums to the Defendant as agreed by the parties, the Defendant provided the Plaintiff with a Third Party Motor Insurance Cover with respect to the said Motor Vehicle Registration Number No. KAS 056B.
  - iii. That on or about 20<sup>th</sup> May, 2019, during the subsistence of the insurance cover, the Plaintiff's Motor Vehicle Registration No. KAS 056B was involved in an accident along Argwings Kodhek road. Full particulars whereof are within the Defendant's knowledge.
  - iv. That as a result of the Accident Motor Vehicle Registration No KCK 505k Mercedes Benz belonging to the Interested Party herein was slightly damaged.
  - v. That Subsequently the Plaintiff was served with summons to enter appearance in Nairobi SCCC No. 1189 of 2022 which suit shall hereinafter be referred to as the Primary suit arising from the said accident.
  - vi. That the matter was heard and the court gave Judgement in favour of the interested party herein who was the Plaintiff in the Primary suit to the tune of Kshs.628,666/=.
  - vii. That despite the Defendant acknowledging the existence of the insurance policy they have refused to settle the said Judgement on the basis of unfounded allegation that the Accident was as a result of the Plaintiff being intoxicated.
  - viii. That as a result of the Defendants' refusal to take up liability and settle the decretal sum the Interested Party has now instructed Betabase Auctioneers who have issued a Proclamation Notice against the Plaintiff and the Plaintiff now is at risk of being auctioned.
  - ix. That it is only fair and in the interest of justice that this application be heard expeditiously and be allowed as prayed.
3. It is supported by the affidavit of Sheila Nyambeki Nyareru sworn on 17/11/2023 in which she deposed that at all times material to this suit, she was the one controlling the Motor Vehicle Registration No. KAS 056B Volkswagen Jetta.
4. That by a Policy of Insurance particulars; C/No C175302316 PINO P/ 101/ 1002/2018/001019/ TPO issued to her by the Defendant, and in consideration for the payment of insurance premiums to the Defendant as agreed by the parties, the Defendant provided her with a Third Party Motor Insurance Cover with respect to the said Motor Vehicle Registration Number No. KAS 056B.
5. That the Third Party Motor Insurance Policy issued to her by the Defendant was for the agreed period commencing 01<sup>st</sup> August 2018 to 31<sup>st</sup> July 2019 both dates inclusive in respect of any liability which



- may be incurred by the Plaintiff in respect of damage, death of or bodily injury to any person caused by or arising out of the use on the road of his Motor Vehicle Registration Number No. KAS 056B.
6. That on or about 20<sup>th</sup> May, 2019, during the subsistence of the insurance cover, the Motor Vehicle Registration No. KAS 056B was involved in an accident along Argwings Kodhek road. Full particulars whereof are within the Defendant's knowledge.
  7. That Plaintiff avers that as a result of the Accident Motor Vehicle Registration No KCK 505k Mercedes Benz belonging to the Interested Party herein was slightly damaged.
  8. That subsequently the Plaintiff was served with summons to enter appearance in Nairobi SCCC NO. 1189 of 2022 which suit shall hereinafter be referred to as the Primary suit arising from the said accident.
  9. THAT the matter was heard and the court gave Judgement in favour of the interested party herein who was the Plaintiff in the Primary suit to the tune of Kshs.628,666/=.
  10. That despite the Defendant acknowledging the existence of the insurance policy and even intimating to settle the Judgement Sum, they have now refused to settle the said Judgement on the basis on unfounded allegation that the Accident was as a result of the Plaintiff being intoxicated.
  11. That as a result of the Defendants' refusal to take up liability and settle the decretal sum the Plaintiff has now been proclaimed and is at risk of being auctioned.
  12. That the allegations that the plaintiff was intoxicated at the time of the accident couldn't be further from the truth and there is no evidence to support the same.
  13. That in any event, the plaintiff is aware that Section 10 of the *Insurance (Motor) Vehicle Third Party Risks) Act* obligates the Defendant to settle any third party claims against the insured and thereafter come after the insured should the insured have acted in any manner that voids the Insurance Policy.
  14. That as the subject Motor Vehicle was duly insured at the time of the accident which was subject of the primary suits, which policy was never repudiated by the Defendant, the Defendant ought to satisfy the decretal sum arising in the primary suit.
  15. That it is in the interest of Justice that the Application herein be allowed and stay of execution of the Primary Suit granted to allow the Plaintiff an opportunity to enforce the Insurance Policy which it had taken out.
  16. The defendant did not oppose the application.
  17. The interested party opposed the application in the replying affidavit sworn on 5/12/2023 where she deposed that the Applicant herein was represented in the primary suit, and that it was only after numerous follow-ups on payment of the judgement sum of Kshs. 493,017.00 plus the cost of the suit and interest, did she commence execution against the Applicant.
  18. She explained that the nature of the suit is a material damage claim and not a declaratory suit, and as such, the interested party has been erroneously enjoined in the suit as she was not privy to the contract between the Plaintiff and Defendant.
  19. She deposed that this court should order the Plaintiff and Defendant to deposit the decretal sum in court pending the hearing and determination of this suit as a condition for stay.
  20. She further explained that she had incurred expenses in trying to realize the fruit of the judgement in her favour, including auctioneer fees.



21. She also deposed that the current application is an abuse of Court process, and it is in the interest of justice that it be dismissed with costs.
22. The Applicant and Interested party filed written submissions.
23. The Applicant submitted that Section 10(1) of the *Insurance (Motor Vehicle Third Party) Act* provides that;-
  - 10) 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.
24. 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.
25. She contended that she had produced the Policy No. P/101/1002/2018/001019 she took out with the Respondent to demonstrate that she indeed was covered under the said policy for all third party claims. The existence of the policy in fact has not been disputed by either the Respondent or Interested Party.
26. She further submitted that it is mandatory for an Insurance Company to satisfy a claim under Section 10(1) of the *Insurance (Motor Vehicle Third Party) Act* where Judgement has been entered against its insured. This obligation extends even to instances where the insurer believes that there were circumstances which have an impact of voiding the insurance contract. The insurer has the obligation of paying the claim first and then pursuing the insured to be indemnified.
27. She contended that the question as to whether material damage can/or cannot be claimed in a declaratory suit is a question that can only be discerned from the policy and if such cover has been provided for under the Policy, then the provisions under Section 10(1) apply and the Respondent is obligated to settle the claim.
28. She further submitted that Section 5 of the said *Act* does not limit the application of Section 10 (1) to injury and death claims only but sets the minimum requirement for a third party policy. Parties can contract under the Policy to cover other third party claims such as that of material damage as the case herein.
29. She relied on the decision in *Charles Makenzi Wambua v Africa Merchant Assurance Co. Ltd & another* [2014] eKLR where the court thus held;-

“Albeit this is not an appeal and therefore the principle applicable in applications of stay pending appeal may not, strictly speaking be applicable, I have no doubt in my mind that such principles are applicable to some extent.”



30. She also relied on the finding in *Alois Ochieng' Ndege v Explico Insurance Company Limited; Jane Wachuka Munene (Interested Party)* [2022] eKLR where the court was faced with a similar issue the court held:-

“As earlier mentioned, the application now before me concerns itself with the granting of an order for a stay of execution. In that case, Order 42, Rule 6(2) of the *Civil Procedure Rules, 2010* sets out the conditions to be met when it comes to an application for a stay of execution as follows:

The application must be brought without unreasonable delay; The applicant must demonstrate that substantial loss may result; and Provision should be made for security.”

31. The Applicant asserted that she filed the present Application without reasonable delay as soon as the Defendant reneged on its promise to settle the decretal sum in the Primary suit.
32. She contended that she is at risk of suffering substantial loss should the Application herein not be allowed. As already demonstrated the interested party has already proceeded to proclaim the Plaintiff items including household items in a bid to satisfy the decree.
33. On the issue of Security, she submitted that the Application herein seeks to enforce the Interested Party claim in the first place thus this condition does not form part of the requirements for granting an order of stay in the Present Application. She relied on the sentiments of the court in *Charles Makenzi Wambua v Africa Merchant Assurance Co. Ltd & another* [2014] eKLR where the court further held;-

“However, the circumstances of this case, unlike in application under Order 42 Rule 6 the *Civil Procedure Rules*, do not require or mandate this court to order for deposit of security for the due performance of such decree or order as may ultimately be binding on him.”

34. She contended that it will be unjust to require the Applicant herein to be burdened by the decretal sum in the primary suit yet the insurance company is alive and bound under law and Contract to satisfy the same Judgement. She relied on the finding in the case of *Charles Makenzi Wambua v Africa Merchant Assurance Co. Ltd & another* [2014] eKLR where the court observed as follows while allowing an application similar to the Application before court;-

“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.”



35. We concluded that she has proved that she is deserving of the Stay Order of this court to allow her pursue her case against the Respondent and that the court allowing the Application herein, not only will it be doing justice to the Applicant, but to all parties in the suit herein.
36. The interested party submitted that this Application is a gross abuse of the court process whose sole aim is to delay and/or prevent the interested party from enjoying fruits of a lawful judgment delivered in Milimani SCCC Number E1189 of 2022 Sheila Gataka Mwihia versus Sarah Nyambeki Nyareru. She invited this Honourable court to note that the Plaintiff/Applicant has not exhibited any policy schedule to demonstrate that she was actually the insured of the Defendant herein.
37. She contended that the Plaintiff's remedy lies in terms of breach of contract for the Defendant's failure to satisfy the judgment which can only arise once the Plaintiff/Applicant pays the full decretal sum in Milimani SCCC Number E1189 of 2022 Sheila Gataka Mwihia versus Sarah Nyambeki Nyareru. Therefore, this court should order either the Plaintiff or the Defendant to deposit the decretal sum in the primary suit as security pending the hearing and determination of this suit as a condition for stay of execution.
38. She asked this court to take note that the Applicants were only jolted from slumber upon being served with the warrants of attachment and proclamation notice and this demonstrates that the Application is an afterthought and has been brought to deny the interested party the fruits of his judgment. She urged this Honourable Court to dismiss the Applicant's Application.
39. On the question of prejudice, she submitted that the respondent has a judgment in its favour, and it deserves to enjoy the fruits of hard-fought litigation.
40. She relied in the decision on the case of *Kassam Hauliers Limited v Mezgebu Gatachew Mammo* [2022] eKLR where Chepkwony J held as follows:

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“ 11. In addition to that, in the case of James Wangalwa & Another –vs- Agnes Naliaka Cheseto [2012] eKLR, that:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss.

Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

It therefore follows that the assertions by the Appellant/Applicant that the process of execution is likely to be put in place or that its properties are likely to be attached is not in itself a basis of granting the orders of stay as sought. In my view, purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant



who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. In that connection, having found the Judgment in the primary suit is not the subject of the present appeal, I see no basis for granting of stay of execution as sought.

In the upshot, I find that the application dated 4th June, 2021 is void of merit and dismiss the same with costs.

41. In the event this Honourable court is inclined to grant stay of execution, she urged this court to order the Plaintiff/Applicant to deposit the decretal sum before this Honourable court in a joint interest-earning account. She relied on the finding in the case of *Alois Ochieng' Ndege v Explico Insurance Company Limited; Jane Wachuka Munene (Interested Party)* [2022] eKLR where Serгон J held that :

“The law is clear that the provision of security for the due performance of the decree is a mandatory requirement in the granting of an order for a stay of execution.”

42. She prayed that the Application be dismissed with costs.

43. The sole issue for determination is whether the plaintiff should be granted stay of execution pending the hearing and determination of the declaratory suit.

44. Order 42, Rule 6(2) of the *Civil Procedure Rules, 2010* sets out the conditions to be met when it comes to an application for a stay of execution as follows:

- a. The application must be brought without unreasonable delay;
- b. The applicant must demonstrate that substantial loss may result; and
- c. Provision should be made for security.

45. I am persuaded by the reasoning *In the Matter of Katuku v Nzolove (Suing as the Legal Administrator of the Estate of the Late Benedict Musyoki Mutemi)* (Miscellaneous Civil Application E190 of 2023) [2023] KEHC 26495 (KLR) (14 December 2023) (Ruling) where the court held that:

“ . . . there is no appeal filed as against the judgment . . . That being so, it is obvious that this court is divested of jurisdiction to further consider the other parameters as to whether stay of execution should be granted with respect to the said decree.”

46. The application was filed within reasonable time and this court has the discretion to consider the same.

47. The law is clear that the provision of security for the due performance of the decree is a mandatory requirement in the granting of an order for a stay of execution.

48. In the end therefore, the application dated 17/11/2023 is hereby allowed, giving rise to the following orders:

- i. There shall be a stay of execution of the judgment and decree of the primary suit on the condition that the plaintiff deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties' advocates/firm of advocates within 60 days from today, failing which the order for stay shall automatically lapse.
- ii. Upon considering the nature of the present suit, I hereby order that the same be expedited and that the parties take dates before the Deputy Registrar on priority basis.
- iii. Costs of the application to abide the outcome of the suit.



49. If the defendant has failed to file a defense the plaintiff should proceed to formal proof.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
24<sup>TH</sup> DAY OF MAY, 2024.**

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**A. N. ONGERI**

**JUDGE**

