



Onzee v Invesco Insurance Co. Ltd & another (Civil Appeal E079, E080, E081, E082, E083 & E084 of 2023 (Consolidated)) [2024] KEHC 4775 (KLR) (8 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4775 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E079, E080, E081, E082, E083 & E084 OF 2023 (CONSOLIDATED)**

PJO OTIENO, J

MAY 8, 2024

BETWEEN

PELINA MALOBA ONZEE APPELLANT

AND

INVESCO INSURANCE CO. LTD 1ST RESPONDENT

METRINE NAFULA WANYONYI 2ND RESPONDENT

*(Being an appeal from the Ruling of Hon. R.S. Kipngeno
(PM) in Butali PMC Civil Suit No. E065 OF 2023)*

JUDGMENT

Background of the Appeal

1. The 2nd Respondent sued the Appellant in Butali PMC Civil Suit No 133/2021 for general and special damages and interest of the suit in relation to injuries she allegedly sustained while aboard Motor Vehicle Registration Number KBX 752 Y. Judgment was delivered on 15/9/2022 and the 2nd respondent was awarded damages in the sum of Kshs 231,550/- together with costs and interest of the suit.
2. The Appellant thereafter made an application for stay of execution of the decree arising therefrom pending the hearing and determination of a declaratory suit filed against the 1st Respondent.
3. In a ruling of the court delivered on 2/5/2023, the court found and held that although section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act* entitles the Appellant to seek a declaratory suit to compel the insurer to settle claims, the right does not however stop an injured party from pursuing compensation against the insured and the application was thus dismissed.



4. Aggrieved with the ruling of the trial court, the Appellant's lodged a Memorandum of Appeal dated 16th May, 2023 premised on the following grounds;
 - a. That the learned honourable magistrate erred both in law and in fact by disregarding section 10(1) of *Third Party Insurance Act* Cap 405.
 - b. The honourable learned judge erred in law and in fact in failing to afford the applicant an opportunity to compel his insurer to pay and settle the judgment debt.
 - c. That the learned honourable judge erred in law and in fact at arriving at the said decision to dismiss the applicant for stay pending declaratory suit.
 - d. That the honourable magistrate erred in law and in fact in failing to consider the applicant's submissions.
 - e. In the further result, the learned Hon. Magistrate erred by disregarding the evidence adduced by the applicant of insurance.
5. For the above reasons, the Appellant prays that the appeal be allowed with the consequence that the dismissal order be set aside and in its place be substituted an order of for stay of execution pending the determination of the declaratory suit.
6. With the consent of the advocates for the parties, an interlocutory application for stat pending appeal was abandoned in order to fast track the appeal and the appeal directed to be canvassed by way of written submissions. Parties also agreed on consolidation and the six appeal files were consolidated with an order that the decision in this matter binds all the other five files.
7. Pursuant to those directions, the Appellant filed written submissions dated 12.09.2023 on the same day while the Respondent's submissions were dated 12.09.2023 but filed on the 18.09.2023. Those submissions are more focused on stay pending appeal rather than the appeal itself.
8. It is the submission by the Appellant that the Honourable Magistrate erred in law in disregarding section 4(1) and section 10 of the Insurance (Motor Vehicle Third Party Risks) Act whose purpose is to obligate an insurer to pay the decretal sum in respect of an accident covered by its insurance policy in which regard the decision in *James Akhatioli Ambundo v Lion of Kenya Insurance Co Limited* [2021] eKLR was cited where the court held as follows;

“It is therefore evident that the policy did cover an authorized driver. The effect of this is that where the insured driver causes an accident and is found culpable by a court, then the insurer must settle the claim since the driver is covered by the policy just like the policy holder or the owner of the vehicle. It's not mandatory that the insured must be the judgment debtor for the insurer to be called upon to settle the claim by the injured third party.”
9. The submission then veers to address when to grant stay pending appeal and what suitable security should be ordered and cites decision considered to support its case.
10. For the Respondent it is her submission that the Appellant has not met the pre requisites for a grant of stay of execution as set out in Order 42 Rule 6 of the *Civil Procedure Rules, 2010* since; a) the Appellant has not demonstrated how she will suffer irreparable loss if the stay is not granted; b)no appeal will be rendered a nugatory since the Appellant has not preferred an appeal against the judgment in which she is the judgment debtor and the 1st Respondent the decree holder and; c) the Appellant has not offered security for the due performance of the decree.



Issues Analysis and Determination

11. The court has considered the grounds of appeal, the proceedings of the lower court and the submissions by both the Appellant and the Respondent and discerns the merit issue for determination to be what is the import of section 10 of the *Insurance (Motor Vehicle Third Party Risks) Act* and whether it bars a decree holder from executing a decree against an insured.
12. However, before going to the merits, the court notes that the order sought to be challenged was issued pursuant to an application disclosed to have been founded upon order 5, Order 22 Rule 25, sections 3 and 3A of the *Civil Procedure Act* and sections 4 and 10 of Cap 405. The orders sought are essentially for stay pending determination of the declaratory suit filed by the Appellant against the 1st Respondent seeking to enforce settlement by the 1st Respondent of a decree in favour of the 2nd Respondent against the Appellant. Looking at the prayers of the motion, nothing concerns service and thus there is no justification to seek application of Order 5. On the same note, Order 22 Rule 25 applies only where the pending suit is against the holder of a decree and not where the suit is by the decree holder against a third party to the decree like in this case. The court thus finds that that provision did not apply to the Appellant's application. That leaves the provisions on the special jurisdiction of the court and its inherent powers to facilitate administration and access to justice as well as the provisions of Cap 405.
13. The right to appeal must be created by so that not every decision by every court attracts an appeal as of right. It is from that established and trite position of the law that rationalizes the existence of Order 43 of the Rules. Being an appeal against the ruling and orders of the court dated 2.5.2023, it could only lie if it was in the category the law recognizes to attract an appeal as of right or else with the leave of the court or if it was a decision that conclusively determines the rights of the disputants.
14. The record availed to court does not reveal that leave was ever sought nor obtained but further that the decision was merely interlocutory and left the dispute to be resolved by the court. Based on those facts and when applied to the law, the court asked counsel for both sides to address it on the propriety of the appeal and having taken such address into account and now determines that the appeal lies not and is thus struck out.
15. Equally important is the fact that the order sought to be stayed is not the order giving rise to the appeal. It remains the learning of the court that it is only the court issuing the decree or the court to which a decree is set for execution that has the jurisdiction to consider staying the said decree. That is the input of Section 34 of the Act which the court is hesitant to ignore but can only honour.
16. The issue of jurisdiction ought to have been taken up at the earliest opportunity by the but was not so taken with the consequence that the counsel have taken time and resources to address the merits of the appeal at it would be impolite on the part of the court to totally fail to address the merits of the appeal had the appeal been properly placed before the court. The court will thus briefly address the merits of the appeal.
17. Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* provides for the duty of an insurer to settle a decretal amount in all situations where the insurer has effected a policy upon which a risk has arisen even where the insurer may be entitled to avoid the policy or even where the same has been avoided, for the full decretal sum including interests and costs, only subject to the sum capped under section 5. In its own words the Act stipulates:-

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“ 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.

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.”

18. In the opinion of the court, this provision stops not a decree holder from enforcement and recovery of the decretal sum directly from a judgment debtor as the decree holder and the primary duty bearer for the tort sued upon. The High court, sitting in Siaya, in the case of *Stephen A. Odhiambo v Monarch Insurance Co Ltd; Senge & another (Interested Parties)* (Civil Case E002 of 2022) [2022] KEHC 15610 (KLR) (23 November 2022) (Ruling) when faced with a similar situation had this to say: -

“It may be argued 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 plaintiff prosecute his case.

29. 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 *Dolk Limited v Invesco Assurance Company Limited & 5 others* [2018] eKLR and in *Muthuri Ntara & another v Francis Mworira Igweta* [2016] eKLR the court in both instances stated that despite the fact that section 10 (1) of the *Insurance (Motor Vehicle Third Party Risks) Act* provides for the mandatory satisfaction of a judgement of any sum payable to its insured under a policy, the section does not provide for a stay of execution against the insured by the third party and further that the statutory right to seek a declaration against the insurer by the insured does not and cannot bar a decree holder from executing his/her decree against the judgement debtor who is the insured.”

19. The court shares the view that on the face of it, it might be convenient and in fact financially humane to grant stay for a limited period, as it has done in this case by maintaining status quo since the 17.5.2023, but such an approach must also appreciate that the second Respondent is also entitled to the fruit of her litigation now crystalized in the decree. To grant stay for the indefinite period of the pendency of the suit before a separate court would not serve the need to protect the property rights in the decree. The court is thus persuaded and fully in agreement with the finding of the above cited decision that a declaratory suit should not curtail a decree holder from enjoying the fruits of a judgment.
20. For that reason, even if the appeal would have been properly before the court, the could would have found no merit in the appeal and dismissed the appeal by upholding the finding by the trial court



that it would be imprudent to keep keeping the 2nd Respondent away from the fruits of his litigation. However, it remaining that the appeal does not lie, the same is hereby struck out.

21. Because the appeal has been struck out at the prompting of the court, and not the Respondents, it is directed that each party shall bear own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF MAY, 2024.

PATRICK J O OTIENO

JUDGE

In the presence of:

No appearance for the Appellant

No appearance for the 1st Respondent

No appearance for the 2nd Respondent/Interested Party

Court Assistant: Polycap

