



**Guardian Coach Limited & another v Invesco Assurance Company Limited
(Civil Case E003 of 2022) [2024] KEHC 8285 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL CASE E003 OF 2022
TA ODERA, J
JUNE 3, 2024**

BETWEEN

GUARDIAN COACH LIMITED 1ST PLAINTIFF

JERAN CONSTRUCTION COMPANY LIMITED 2ND PLAINTIFF

AND

INVESCO ASSURANCE COMPANY LIMITED DEFENDANT

RULING

1. The Plaintiffs/applicants vide a notice of motion dated 27th January, 2022 seeking the following orders;
 - a. spent
 - b. stay of execution of Judgment and or proceedings in Kisii Chief Magistrate Court Civil Case Number 384 of 2019; Joseph Onjiko -vs- Jerani Construction, Nyamira Express and the Guardian Coach Limited all consequential decree or order emanating therefrom pending the hearing determination of this application.
 - c. The stay of execution of Judgment and or proceedings in, matters filed in Kisii Law Courts against the Plaintiffs/Applicant consequential decree or order emanating therefrom pending the determination of this application.
 - d. This application and or suit be served on the advocates representing the third Party Claimants in the above stated suit
 - e. The defendant/Respondent be ordered to defend, take over the conduct and or offer representation inclusive settlement of the decretal sums as the case may be in matters stated in paragraph 2 pending the determination of the suit. case may be m



- f. The defendant/respondent be ordered to abide with the terms of insurance contract binding the plaintiff /applicant in respect of the above stated suit and or judgments of courts and any other judgment that may arise in respect of the insurance contract and period pertinent to this suit.
 - g. The costs of this application be provided.
2. The Application was brought under Order 51 Rule 1 & 13 of the Civil Procedure Rules, 2010, section 1A & B, 3A, 63(e), of the Civil Procedure Act, Sections 4, 5, 8, & 16 Insurance (Motor Vehicle Third Party Risk) Act CAP 405 Laws of Kenya, of, Section 2 and 19 of Insurance Act CAP 487 Laws of Kenya as well Article 50 (1), 159 (2) (d), 165 (3) (a) of the constitution of Kenya 2010. In support of their Applicants averred through the supporting affidavit sworn by Mr. Julius Mokaya Ong'era a director to the Plaintiffs that;
- a. On various dates between the years 2014-2016, they paid premiums to Claims to defendant/ Respondent to secure third party claims arising from accidents involving their fleet of Motor vehicles.
 - b. The Applicants have learnt that there are several civil matters filed before this Honourable Court arising from accidents involving the Motor vehicles which are pending hearing and some are at the stage of execution.
 - c. In the case of CMCC No. 384 of 2019, Judgment was delivered in sum of Kshs. 9,000,000/- plus interest and costs against the Applicants herein and the Claimant therein is in the process of obtaining Decree and Certificate of Costs to the detriment of the Applicants herein if stay is not granted by this Honourable Court.
 - d. The processing of the suit herein up to the decree level and issuance of execution documents has/had been brought to the attention of defendant/respondent and that the commenced execution will inflict atrocious consequences on the plaintiffs /applicants who fully performed its obligations to anchor the insurance contract with the defendant/respondent.
 - e. The defendant was /is the insurer of the plaintiffs /applicants and that the plaintiffs, applicants have diligently performed its contractual obligations regarding payment of premium, reporting of accidents and any case filed against the plaintiffs.
 - f. The plaintiffs /applicants were insured with the defendant /respondent to fulfil a contractual obligation and a reasonable expectation that in the eventuality of a Third Party Claim or suit the defendant shall defend on behalf of the plaintiffs or settle judgement or decree directed at the plaintiffs/applicants.
 - g. Currently there are several suits pending and or judgment under execution in furtherance of Third Party Claims which the defendant /respondent has failed, refused or neglected to manage.
 - h. In the circumstances execution of the subject judgment in any of the cases above shall render this application nugatory and occasion substantial and irreparable loss to the plaintiffs / applicants herein. the Applicants herein implore/urge this Honorable Court to invoke its inherent/unfettered jurisdiction and order the defendant/respondent take contractual and legal responsibility involvement in matters pertinent to the above suits.
 - i. If the judgments are executed as commenced by the Third Party Claimants, the plaintiff / applicant shall suffer irreparable prejudice inclusive of denial of the rights to be heard on merit.



- j. The plaintiff /applicant has an obligation to suppliers and financiers of its busses to continue in business without disruption and that the claims by Third Parties and the indifference of the defendant to Third Party Claims is bound to inflict profound and unfavorable damage to the business
 - k. The auctioneers acting on behalf of Third Party Claimants have already, seized the vehicles belonging to plaintiffs /applicants and are likely to auction the same any to the detriment of the applicants.
 - l. The applicants are not in breach of the contract and that change to a to a different insurer for the period commencing 2017 has bricked the Respondent who has set in motion a scheme to frustrate and undermine the Plaintiff a scheme the Plaintiff's business.
 - m. In the circumstances, if this application is not heard as a matter of urgency, the attachment will ensue /take effect and the application herein rendered nugatory.
 - n. It is mete, just and in the wider interests of justice that the applicants herein be given the opportunity to pursue the application herein to its logical end by setting aside the judgement in default.
 - o. No prejudice whatsoever or at all shall be occasioned upon the respondent if the orders sought herein are allowed.
3. The Respondents vide a replying affidavit sworn by one Veronica Okello, a legal officer of the defendant/Respondent responded to the Application and stated that;
- a. The Plaintiff/ Applicant's application is misconceived, mischievous, and incompetent and contains untrue statements meant to mislead this court.
 - b. The application offends the provisions of Article 159 of *the Constitution* and the overriding principle in the *Civil Procedure Act* 2010 which apply to all the litigants both as a shield and as a sword, and the plaintiff cannot invoke the same to justify their case.
 - c. The annexed supporting affidavit is also full of falsehoods with intend to mislead the Honorable court.
 - d. The Defendant/Respondent it is not aware of any suit regarding 1st and 2nd. Applicants' vehicle. In any case, the Applicants have not provided the list of motor vehicles allegedly insured by the Respondent.
 - e. The Defendant was not served with statutory notices of the alleged suit
 - f. The defendant/Respondent is not aware of the existence CMCC No 384 and any Judgment delivered to that regard.
 - g. The Defendant/Respondent has never been served with summons to enter appearance nor the statutory notice to Defendant its interests if any.
 - h. The Defendant has never been served with notices of entry of judgment. There is no affidavit of service forwarding summons the Defendant Respondent to take up the matter.
 - i. The correspondence letter sent to the defendant does not amount to issuing of the statutory notice contrary to section 10(4) of the *Motor Vehicle (Third Party Risky)* Cap 403. Laws of Kenya.



- j. There is no evidence on record that indeed the Applicants were insured by the Defendant / Respondent and the list of motor vehicle purportedly insured together with the copies of certificate of insurance for the said period.
- k. The Defendant /Respondent is not obliged to satisfy any Judgment as it was not the insurer of the purported victim vehicles. This issue can only be ventilated during hearing of the main suit.
- l. The Defendant/Respondent will be highly prejudiced if the application is allowed considering that the plaintiffs/applicants have not proved that the Defendant/Respondent was the insurer of the subject motor vehicles at the time of the alleged accident.
- m. The Applicants have not demonstrated that they will suffer irreparable prejudice if the order sought are not granted as alleged at paragraph 12 of the supporting affidavit.
- n. The Defendant/Respondent has not interfered in any way with the Applicants' business. In any case the Applicants provide transportation services which is, much distinct with the Defendant/Respondent services as an insurer.
- o. There are no warrants of attachment annexed to this application showing that the auctioneers have seized the Applicant's motor vehicles.
- p. The Plaintiff/Applicant's application be found by this court to be unmerited and dismissed with costs.

Background of the Suit

4. The Applicant filed this suit *vide* a plaint dated 28th July, 2024 together with this Application. In the Plaint the Plaintiff prayed for the following orders;
 - a. A Judgment be entered in favor of the plaintiffs vide an order directing the Defendant to honor all its contractual obligations to the Plaintiff and all third party claimants pursuant to the provisions of Cap 405 Laws of Kenya.
 - b. A declaration that public policy enjoins the defendant to uphold the contract as regards the imperatives of sections 4, 8, and 16 of the Insurance (Motor Vehicle Third Party Risk) Act CAP 405 Laws of Kenya by settling the Third Party Claims on behalf of the Plaintiffs.
 - c. An order directing the defendant to take over all suits filed, pending or filed against the Plaintiff the defendant to take over conduct/defend all suits mentioned under paragraph 12 of the plaint and any other suit pending or likely to attract Judgement in respect of the contractual period.
 - d. That an order stopping execution of judgment or any decree emanating from the Judgements of any court issued against the plaintiffs herein in respect of the period of the insurance cover.
 - e. Costs of the suit provided for
 - f. Grant any relief deemed fit by the court.
5. In support of the claim the plaintiff stated that at all material times herein, the defendant was /is the insurer of the plaintiffs within the meaning of Section 2 of the Insurance Act CAP 487 Laws of Kenya. The insurer was/is licensed to carry out insurance business within the ambit and provision of the Insurance Act CAP 487 Laws of Kenya and or within the imperatives of Insurance (Motor Vehicle Third Party Risk) Act CAP 405 Laws of Kenya. Thereafter Defendant issued and delivered to the plaintiffs'



- insurance stickers/certificates for mounting on the subject Insured motor vehicles which ply various routes from Kisii, Nairobi, Kisumu, Homabay, Migori, Siaya, Kericho Bomet among others.
6. During the period/years 2014 - 2016, pursuant to the presentations and invitations of the defendant and cognizant of the nature of the business offered by the defendant, the defendant and plaintiffs entered into a contract whereof the defendant undertook to provide and provided third party Insurance cover in respect of the Motor Vehicles owned and operated by the plaintiffs. Pursuant to the above stated arrangement the plaintiffs were to pay the requisite pertinent premium and did pay the agreed premium on agreed terms and that at all times pertinent to this matter the plaintiffs had fully diligently and punctiliously discharged its contractual obligations to the defendant.
 7. At all material times the plaintiffs' Motor Vehicles were being driven on public roads Public space by dint of the compulsory *insurance (Motor Vehicle Third Party Risk) Act* CAP 405 Laws of Kenya which is a compulsory component meant to protect Third Party Claimants without undermining the plaintiffs herein who paid premium and sealed the contract with the defendant. The plaintiffs contended that the defendant is contractually and legally enjoined to attend and deal with all Third Party Claims /suits filed against the plaintiffs and their outcome.
 8. The Plaintiff further claimed that it was agreed and germane to the said contract the defendant defendants or appoints advocates to defend all suits /claims filed and urged in any courts or local jurisdictions by Third Party Claimants against the plaintiffs herein (the insured) in respect of road related accidents as and when they arise.
 9. They claimed that it was a fundamental term that besides defending the said suits as and when they arise, the defendant is enjoined to settle/pay damages ordered or that may be ordered by courts in favor of third claimants. Besides they claimed that it was /is within the discretion of the defendant to appreciate the propriety of such claims; and deal with the same diligently observing the contract, the law and the business sense component thereof in favor and in the best interest of the plaintiffs.
 10. They also claimed that it was a term; implied or express that the plaintiffs bring to the attention and knowledge of the defendant any court processes served or pertinent to Third Party Claims to enable the defendant discharge its mandate according to the applicable and/or germane contract of insurance.
 11. The plaintiffs averred too that in discharge of its mandate all court processes served on the plaintiffs during the said period were communicated and or delivered to the defendant to enable the defendant spring appropriate action consonant with germane contract and the provisions of CAP 405 of the Act.
 12. They narrated that on diverse dates during the contractual period the Plaintiff's motor Vehicles (P.S.V.) were involved in alleged road accidents within the Republic of Kenya where the said vehicles were designated to ply and whereof several people aboard sustained or may have sustained bodily injuries some fatal thus Third Party Claims for damages; which are at various status.
 - a. Kisii CMCC No. 384 of 2019; Joseph Nicholas Nyangare Onjiko vs Nicholas Meso & 2 Others
 - b. Kisii CMCC No. 385 of 2019; Columbus Odanga - vs- Nicholas Meso & 2 Others
 - c. Kisii CMCC No. 387 of 2019; Oscar Rasugu -vs- Nicholas Meso & 2 Others
 - d. Kisii CMCC No. 388 of 2019 Joseph Nicholas Nyangare Onjiko - vs- Nicholas Meso & 2 Others
 13. The Plaintiffs further claimed that there are other pending and unconcluded Third Party claims alleged and pending in various courts within the republic of Kenya some of which are cases, likely to attract



- damages and granted the conduct of the defendant in the above stated continued the insulation of the plaintiffs against Third Party Claimants is likely to be denied to the plaintiffs.
14. They deposed further that anchored on the contract and payment of premium as agreed, the plaintiffs' motor vehicles which were placed on insurance cover against among others Third Party Risks. They deposed too that the contract pertinent to this suit is based on the invitation of the defendant and payment of premium and whereof the defendant committed itself to defend suits and settle all proven liabilities and damages in favor of third parties.
 15. They decried that in breach of the germane contract the defendant has unilaterally, arbitrary and without legal justification elected or obstinately decided to undermine contract by failing, refusing, and/or neglecting to abide and or perform its bargain spelled out, contemplated in the germane insurance contract.
 16. They decried too that the motor vehicles have been proclaimed and carted away on various date from the third Party claims pertinent to the insurance contract period and such are likely to occur or recur even the future date if the defendant is not ordered to operate within the contractual and legal fold in matters pertinent to the Third Party Claims filed against the plaintiffs.
 17. It was the plaintiffs' further cry that the act of breach and continuance of breach on the part of the defendant will and or most likely inflict irreparable losses in form of loss of goodwill; loss of business reputation from the existing and potential customers; loss of good will and confidence from the financiers and thus undermine their business objectives.
 18. They reiterated that their claim was one seeking an order of the court compelling the Defendant to abide and or unconditionally perform or settle or attend to all current/pending suits /existing suits filed by Third Party Claimants in relation to the contract period in respect of the aforementioned Motor Vehicles and or all Motor Vehicles Insured by the plaintiff with the defendant for the period 2012 to date. They maintained that the Third party aspect of the said insurance cover is/ was compulsory imposing statutory obligation on the defendant and that it will be inimical to public policy for the defendant to avoid its obligations to the plaintiff by way of refusal, neglect or failure to abide with the terms of the pertinent insurance contract or pay Third Party Claims.
 19. The plaintiffs averred further that the defendant owes it and the Third Party Claimants a legal and contractual duty of care. The plaintiff shall at the hearing hereof refer to the relevant legal and contractual obligations pertinent to the business and presentations of the defendant.
 20. It was plaintiff's averment that resultant defendant's conduct; acts and omissions the plaintiffs Public Service Vehicles (P.S. V.) business is exposed to undeserved financial peril and inconvenience if and unless the defendant is ordered to perform its obligations to the plaintiff and or Third Party Claimants against the plaintiffs.
 21. The Plaintiffs decried that in the Case filed in Milimani High Court Commercial & Tax Division under the *Insolvency Act*; Insolvency Notice No. EO 19 of 2018: the defendant has failed, neglected and or refused to pay, negotiate, and settle the decretal sum in judgement against the plaintiffs.
 22. In preservation of this suit, the Applicant has filed this Application in the manner outlined herein above seeking stay of execution of KisiiCMCC No. 384 of2019; Joseph Nicholas Nyangare Onjiko vsNicholas Meso & 2 Otherswhich is among the suit he has listed in his plaint.
 23. As per the Judgment attached to the Application, the suit was commenced by Mr. Joseph Nicholas on behalf of his late brother Geoffrey Otieno Onjiko(deceased) who died out of an accident that was allegedly caused by the recklessness of the Applicant's driver. The said driver was driving a motor



vehicle Registration number KBP 165P, Scania Bus registered in the joint names of the applicants on 18th November, 2016 along Keroka-Kisii Road when he out of negligence hit the deceased person's vehicle. As a result of the said accident the deceased suffered fatal injuries that led to his death.

24. According to Judgment too, it is outlined that the Applicant was served with summons to enter appearance which he honored and filed his statement of defense. The Applicant however failed to attend the hearing of the case despite being served and thus the court heard the Plaintiff and entered a judgement in his favor on 22nd June, 2022. The estate of the late Geoffrey Otieno Onjiko (deceased) a sum of Kshs. 9,211, 950/= damages as well as costs of the suit. The Defendant was given 30 days to appeal against the Judgment of the court.
25. It is the above Judgment that is the Subject of this Application. This court directed that this matter be disposed of by way of written submission. The Applicant filed their submissions on 19th February, 2024 while the Respondents filed their submissions on 11th July, 2022.

Issues for Determination

26. I have considered this Application, the background of the suit, the response by the Defendants and the written submissions that both parties have filed my finding is that the sole issue for determination is whether the orders sought in the Application ought to be granted.

Analysis and Determination

27. It is clear from the background of this case that the Applicants' claim against the Respondent/ Defendants is in one for breach of contract wherein they allege that the Defendant who is their insurer has breached its contractual obligations by not either defending suits filed by third parties against the Applicants/Plaintiffs or by not paying out Judgment debts accruing from concluded claims filed against the Plaintiffs. The Plaintiffs have therefore approached this court seeking an order compelling the Appellants to honor its part of the contract by either defending the pending suits or by paying out the Judgment debts.
28. One of such claims and to which this Application is anchored is KisiiCMCC No. 384 of2019; Joseph Nicholas Nyangare Onjiko vsNicholas Meso & 2 Others. I will therefore in my analysis and determination of this Application limit myself to KisiiCMCC No. 384 of2019; Joseph Nicholas Nyangare Onjiko vsNicholas Meso & 2 Others.
29. According to the Plaintiffs, the above matter has already been concluded and the plaintiff's therein have commenced execution process have attached some of their buses for auctioning. According to them it is the Defendant/Respondent herein who are supposed to bear the burden of the said Judgment given that the two have an insurance contract entered between them to defend or bear the consequences of Judgements accruing from such claims.
30. The Applicant has therefore in this Application sought for an order of the court to stay looming execution process pending the hearing and determination of his main suit, an order compelling the defendants to defend/or take over the representation inclusive of settling an award of damages amounting to 9,000,000 awarded therein in accordance with insurance contract/policy entered into between them and as well an order to serve counsel was acting for the plaintiff in matter with stay orders.



31. It is clear from the face of the Application that this orders have mainly been sought under the *Insurance (Third Party Vehicle Party Risk) Act* Cap 405. However, Section 10(2)(a) of the said *Act* provides as follows;

No sum shall be payable by an insurer in respect of any judgment, unless before or within 14 days after the commencement of the proceedings in which the Judgement was given, the insurer had notice of the bringing of the proceedings.

32. As I have clearly outlined in background, the proceedings upon which this application is based were commenced in 2019 by Joseph Nicholas Nyangare Onjikowas representing the estate of his late brother who died out of an accident that occurred on 18th November, 2016. According to the Plaintiff/Applicants, they had within the period the accident occurred taken up an insurance a third party insurance cover with the defendant herein to cover them in case of any accident occasioned by their buses which included the bus that was involved in the Accident.

33. They Applicants have alleged that the defendant/Respondent in compliance with the above provision of the law were fully informed of the said claim prior to the commencement of the proceedings vide a letter dated 27th February, 2017 which letter they attached in the supporting affidavit. A perusal of the said letter reveals that this matter is not amongst the matters listed thereon nor has the letter alluded to the cause of action raised in the matter now that the same was instituted in 2019 long after the letter had been written. As it stands therefore there is no evidence of any notice that was presented to the defendant informing him of commencement of this proceedings in question and there for as provided by section 10(2)(a) of the *Insurance (Third Party Vehicle Party Risk) Act* Cap 405 outlined above, this court cannot compel the defendant to bear the burden of paying the decretal sum of a suit it was not notified of as required.

34. As equally outlined in the background, the Applicant were served with summons to enter appearance which they honored given that they in deed filed a statement of defense. While filing the defense, the defendants had an opportunity to institute third party proceedings against the defendant's as required under order 1 Rule 15 (1) (a) (b) and (c) but they failed to do. Actually they did not show up during the hearing of the matter and the matter proceeded exparte and a judgment was entered against them. They equally have not moved the lower court that entered the Judgement to set aside/be vacate it so that they are able to be heard on merit. Probably had they done so they would have sought leave of the trial court to commence third party proceeding against the Defendant herein within the timelines and requirements set out under order 1, Rule 15 (1) (a), (b) and (c) which provides as follows;

- “ 1. Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
 - a) That he is entitled to contribution or indemnity; or
 - (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
 - (c) that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the court



within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by Affidavit.”

35. I wonder under which law the Applicant would want this court to stay an execution of a judgment that they have not appealed against without the participation of parties in whose favor the Judgment was issued and against parties whom they failed to join to the suit as third parties within the required timelines set out under order 1 Rule 15 (1). This court therefore has no Jurisdiction to interfere with the proceedings and Judgment of a trial court which have not been appealed against. This court has equally no business entertaining third party proceedings which ought to have been instituted at the lower court during the pendency of the suit in question.
36. Further too, as has correctly been pointed out by the learned counsel of the Applicant in his submissions, the Applicants did not bother to attach the insurance policy to their Application that specifically relates to the matter whose Judgment they would wish this court to stay. It is interesting that the Applicant did not bother to reply to the averment by the Respondent/Defendants there existed no contractual between them in relation to the claim by supplying this court with the policy document. Section 107 of the *evidence act* is very clear that whoever desires any court as to any legal right or liability dependent on existence of facts such as the insurance contract in this case, has the burden to prove the existence of such facts. It is quit disturbing that the Applicants apart from sharing the Judgement and two letters that have no connection to this matter, did not both to present to this court the insurance policy that relates to this matter. It is not the duty of the Court to prompt or direct a party to provide details of its claim especially the insurance policy that is key to the determination of this dispute. This court cannot act in a vacuum while granting orders, in this case, stay of execution scanty information provided by the applicant regarding an insurance contract that has not been presented for consideration.
37. As I have equally observed hereinabove this court cannot grant orders to stay execution of a judgment issued in favor of parties who have not been made a party to this proceeding. Such a move would amount to denying them their right to enjoy the fruits of their Judgment as well as ensuring that they are not thrown off from the seat of justice by not being granted an opportunity to be heard. This is because the stay order will operate as against the decree holder as opposed to the defendant herein as such the Applicant should have been bothered to enjoin him to this Application and not to just seek an order for their advocate to be served with the stay orders.
38. Based on by above observation, I find that the Application filed by the Applicant is not meritorious and the same is dismissed with cost to the Respondents.
39. It is so ordered.

T.A. ODERA

JUDGE

3.6.24

Delivered Virtually Via Teams platform in the presence of:

Nyaboke: hold brief for Mr. Nyabega for plaintiff applicant

Wanjohi: for defendant respondent.

Court Assistant - Oigo

