



REPUBLIC OF KENYA



**Kiara v Xplico Insurance Co. Limited; Kimani (Interested Party) (Civil Case E006 of 2024) [2024] KEHC 7582 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7582 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL CASE E006 OF 2024  
EM MURIITHI, J  
JUNE 20, 2024**

**BETWEEN**

**JULIUS GITUMA KIARA ..... PLAINTIFF**

**AND**

**XPLICO INSURANCE CO. LIMITED ..... DEFENDANT**

**AND**

**REGINA NKATHA KIMANI ..... INTERESTED PARTY**

**RULING**

1. By a Notice of Motion under certificate of urgency dated 18/3/2024 pursuant to Section 10 (1) of the *Insurance (Motor Vehicle Third Party) Risks Act*, Order 40 of the *Civil Procedure Rules*, the Applicant seeks that:
  1. Spent
  2. Spent
  3. The honourable court be pleased to issue a stay of execution of the judgment and decree in Meru SCCC No. 68 of 2023 pending the hearing and determination of the suit.
  4. Costs of this application be provided for.
2. The application is premised on the grounds on the face of it and supporting affidavit of Julius Gituma, the Applicant herein sworn on even date. He is the judgment debtor in Meru SCCC No. E068 of 2023 and as at the time of the accident, his motor vehicle had a valid insurance cover from the Respondent herein. There are warrants of arrest dated 8/11/2023 to compel him to pay the decretal sum of Ksh. 838,684 whereas the Respondent had committed itself to settle the decretal sum in installments. His insurer has now failed and/or refused to settle the balance of the decretal sum despite paying Ksh.



300,000 so far. The Respondent had insured his vehicle Registration No. KCB 128 X in respect of injury arising out of the use of the said vehicle and the accident herein is a liability covered by the said policy within the meaning of section 5 (b) of the Insurance (Motor Vehicle Third Party) Risks Act. He is advised by his advocates that the judgment in Meru SCCC No. 68 of 2023 was in respect to liability covered by the said insurance and therefore the Respondent is bound to satisfy it under section 10 (1) of the *Insurance (Motor Vehicle Third Party) Risks Act*. The Respondent had appointed a firm of advocates to defend him in the primary suit which further confirms that he was their insured, and unless the orders sought are granted, he may be committed to civil jail yet he had a valid insurance cover for his vehicle at the time of the accident.

3. The Applicant swore a supplementary affidavit on 26/4/2024 in support of his application.
4. The Interested Party has opposed the application vide her replying affidavit sworn on 9/4/2024. She avers that the application is full of contorted facts skewed to mislead the court. She is the decree holder for Ksh.910,815 and this matter has a checkered history in which the Applicant has been doing everything humanly possible to frustrate her and deny her the fruits of the judgment. Following the Applicant's failure to settle the decretal sum, they executed a consent which the Applicant failed to adhere to, and warrants of arrest were issued against him. Consequently, the Applicant was arrested, and on 15/3/2024, she accepted the Applicant's lenient proposal of Ksh.50,000 per month starting from 30/3/2024, and they recorded a consent to that effect. She is shocked that the Applicant now wants to have the consent orders that he personally executed set aside and/or varied. It is absurd for the Applicant to pit her against the Respondent for insurance contract she was never party to. She is reliably informed that the Respondent is under statutory management and as such it cannot be legally sued or be in a position to settle the decretal sum. She implores the court to dismiss the application with costs and compel the Applicant to pay the decretal sum to enable her meet her responsibilities as a single mother to three children.

### Submissions

5. The Applicant urges that section 10 (1) of the *Insurance (Motor Vehicle Third Party) Risks Act* places a duty upon an insurer to satisfy judgments on behalf of the insured, and cites *Francis Mwobobia v Invesco Insurance Co. Limited; Mwirigi Muguna Nkoroi* (Intended Interested Party/Applicant) [2021] eKLR. He urges that the provisions of section 67 C (2) (i) of the *Insurance Act* do not mean that an insurer ceases to exist once the company is placed under statutory management, and cites *Blue Shield Insurance Company Ltd v Alice W. Kariuki & another* (2014) eKLR. He urges that he has satisfied that he had a valid insurance cover with the Respondent, and it is only proper that stay of execution of the primary suit is issued pending the subsistence of the main suit.
6. The Interested Party urges that no reasons or grounds have been advanced to warrant this court to set aside the consent orders entered between the Applicant and her, and cites *Kenya Commercial Bank Ltd v Specialized Engineering Co. Ltd* (1982) KLR 485. She implores the court to dismiss the application, and cites *In the Matter of Concord Insurance Company* (2014) eKLR and *In the Matter of Blue Shield Insurance Company Limited (Under Statutory Management)* [2017] eKLR.

### Determination

7. The application is premised under Order 40 Rule 1 of the *Civil Procedure Rules* which provides for cases in which temporary injunction may be granted as follows;

“Where in any suit it is proved by affidavit or otherwise— (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or



wrongfully sold in execution of a decree; or (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

8. An application for interlocutory injunction is governed by the principles of interlocutory injunction set out in *Giella v Cassman Brown* (1973) EA 358, and the question before the court is whether a prima facie case has been established; whether damages are adequate compensation in the circumstances of this case, and where, in case of doubt, the balance of convenience lies on the issue of grant of temporary prohibitive injunction.

### **Prima facie Case**

9. The undisputed facts of this case are that the Applicant’s motor vehicle, which had been insured by the Respondent was involved in a road traffic accident, wherein the Interested Party sustained various injuries, and she successfully obtained a judgment in her favour. There is imminent danger of execution of the said judgment and decree by the Interested Party against the Applicant who had taken out a valid insurance cover with the Respondent. The Applicant has commenced declaratory proceedings against the Respondent so that it can be compelled to settle the decretal sum in full in accordance with the insurance policy.
10. However, granting the injunctive orders sought would defeat any consequential execution of the Interested Party’s lawful decree, which she is entitled to. It is not lost to this court that no appeal has been preferred against the trial court’s judgment, which is thus lawful and enforceable.
11. It is this court’s finding that the Applicant has not established a prima facie case with a probability of success. The decisions cited by the Plaintiff related to the joinder of interested parties to a declaratory suit against the insurer, and not on the question whether a judgment debtor is entitled to injunct the levy of execution by the decree holder of a judgment against the insured by reason of a declaratory suit against the insurer.
12. The Court does not at this stage make a determination as to the liability of insurer to the insured which is the final determination in this suit.

### **Irreparable Loss**

13. While the Applicant has a right under access to justice to file the declaration suit in enforcement of the alleged breach of contract of insurance, the Interested Party is equally entitled to realization of the fruits of her judgment by executing her legally obtained decree. The Interested Party is not privy to the contract of insurance between the Applicant and the Respondent and she is consequently no bound by it.
14. The Plaintiff is able to recover the monies that he may pay to the Interested Party in furtherance of the lawful judgment of the Court from his insurer defendant if he is successful in this suit.
15. This court finds that the Applicant has not demonstrated that he will suffer irreparable loss which cannot adequately be compensated by an award of damages.



### **Balance of Convenience**

16. Having found that the Interested Party will undeniably suffer irreparable loss which cannot be compensated by an award of damages if she is restrained from executing her lawfully obtained decree, the balance of convenience tilts in favour of denying the interim injunction as sought in the application.

### **Orders**

17. Accordingly, for the reasons set out above, this court finds that the application dated 18/3/2024 is without merit and it is dismissed.
18. Costs in the Cause.

Order accordingly.

**DATED AND DELIVERED ON THIS 20<sup>TH</sup> DAY OF JUNE 2024.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Mwendwa for Plaintiff.

Mr. Miriti for the Interested Party.

