



**Upper Hill Transporters Ltd v Trident Insurance Co Ltd; Kigen (Interested Party)
(Civil Suit E008 of 2023) [2024] KEHC 7400 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7400 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT E008 OF 2023
JRA WANANDA, J
JUNE 21, 2024**

BETWEEN

UPPER HILL TRANSPORTERS LTD APPLICANT

AND

TRIDENT INSURANCE CO LTD DEFENDANT

AND

PATRICK KIPROTICH KIGEN INTERESTED PARTY

RULING

1. The Plaintiff, through Messrs Wamaasa, Masese, Nyamwange & Co. Advocates, filed this suit on 26/05/2023 seeking a declaration that the Defendant, an Insurance company (and the Plaintiff's insurer), is obligated by law to settle the Judgment entered against the Plaintiff in favour of the Interested Party and arising out of a road accident.
2. Together with the Plaint and the other usual Pleadings accompanying it, the Plaintiff also filed the Notice of Motion the subject of this Ruling, dated 25/05/2023. The prayers sought in the Application are as follows:
 - i. [.....] Spent
 - ii. [.....] Spent
 - iii. That pending the hearing and determination of this suit, this Honourable Court be pleased to make an order of stay of execution of the judgment and decree in Eldoret CMCC No. 206 of 2020 Patrick Kiprotich Kigen vs Upper Hill Transporters Ltd issued on 02.12.2022.
 - iv. That subsequent to prayer 3 above, this Honourable Court do set aside the execution proceedings against the Plaintiff emanating from Eldoret CMCC No. 206 of 2020, Patrick



Kiprotich Kigen Vs Upper Hill Transporters Ltd including the Warrants of Attachment of Movable property issued to Icon Auctioneers.

- v. Costs of this Application be provided for.
3. The Application is expressed to be brought under Article 165(6) of the Constitution, Order 9 Rule 9, Order 22 Rule 22 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by one, Sophia Noor Musa who described herself as the Company Secretary of the Plaintiff.
 4. In the Affidavit, the deponent stated that the Plaintiff was the insured of the motor vehicle Registration number KBP 488C having taken a lawful insurance cover under Policy Number 001/08711/1/002740209 with the Defendant, that the said motor vehicle was involved in a road traffic accident on 11/1/2020 and the Defendant was sued by the Interested Party and held vicariously liable. She further deponed that the suit was duly defended by the firm of Advocates appointed by the Defendant after having been duly served with a statutory Notice pursuant to Section 10(2)(a) of Cap 405 of the Laws of Kenya and that as such, the Plaintiff has all along been under the impression that its interests were well protected.
 5. She deponed further that judgment was duly entered against the Plaintiff and a Decree issued on 02/12/2022 for a total sum of Ksh 710,901.00, that notwithstanding the fact that the Plaintiff's said motor vehicle was insured and that Summons were duly served upon the Defendant, as insurer, and who duly appointed an Advocate to represent the Plaintiff, the Defendant has failed and/or neglected to settle the decree and upon which the Interested Party has now, through Messrs Icon Auctioneers, procured Warrants of Attachment against the Plaintiff's properties in execution of the said judgment issued in total disregard to the mandatory provisions of Cap 405 aforesaid. She stated that under the provisions of Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act (Cap 405), the Plaintiff's insurer is liable to make good the said decree and urged that unless orders for stay of execution are granted, she is coy and apprehensive that the execution proceedings already commenced against the Plaintiff shall be of immense detriment to the Plaintiff's assets in total disregard to the mandatory provisions of Cap 405.

Defendant's Position

6. The Defendant is represented by Messrs Joe Ngigi & Co. Advocates. Its Counsel, Mr. Kinoti informed the Court that the Defendant was not opposed to the Application and would not therefore file any Response thereto.

Interested Party's Response

7. In opposing the Application, the Interested Party, through Messrs Y. Jeruto & Co. Advocates, swore the Replying Affidavit filed on 24/7/2023.
8. In the Affidavit, he deponed that he instituted a suit against the Plaintiff herein, namely, Eldoret CMCC No. 206 of 2020 following a road traffic accident which occurred on 11/1/2020, that the Plaintiff entered appearance therein and filed the requisite documents and the case proceeded for hearing, that when the matter came up for hearing on 30/6/2021, the Plaintiff failed to appear in Court despite being served with a hearing notice and hence the defence case was closed, that following the hearing, the Court entered judgment against the Plaintiff in the sum of Kshs 566,433/-, plus Kshs 26,433/- interest and costs assessed at Kshs 117,535/-.



9. He contended that in any event the Plaintiff has not satisfied the conditions set out in Order 22 of the *Civil Procedure Rules* as the Plaintiff has not demonstrated its willingness to deposit security, that the Plaintiff has not demonstrated what substantial loss it will suffer if the stay is not granted as it is not enough to merely put forward mere assertions of substantial loss without any evidence to support such contention, that he was never privy to the contract between the Plaintiff and its Insurer (Defendant) and that the Plaintiff having not applied to set aside the judgment, the Interested Party is entitled to the fruits thereof. According to the Interested Party, the application is premature and untenable in law for reasons that the judgment-debtor is obliged to settle the decree and thereafter follow up with its insurer.
10. He added that equity aids the vigilant and not the indolent, that the Plaintiff, as the Judgment-Debtor, has only been awoken at the point where it has realized that execution has already been put in motion and is now making a feeble attempt when for a staggering period of 3 years now, it has failed to take any steps to participate in the proceedings, that therefore the Plaintiff is guilty of laches, that the Interested Party is within his rights to enforce the judgment, and that the grant of stay will not only delay the enjoyment of the fruits of the judgment but continues to cause psychological torture. In conclusion, he deponed that if this Court is inclined to grant stay orders, then the Plaintiff should deposit the decretal amount in an interest earning account in the joint names of Advocates on record.

Plaintiff's Supplementary Affidavit

11. With leave of the Court, the Plaintiff, on 24/10/2023 filed a Supplementary Affidavit sworn by the same Sophia Noor Musa. She deponed, in clarifying matters, that the firm of Joe Ngigi and Co. Advocates LLP was appointed by the Defendant and which has been the one paying the Advocates for the services rendered and that the Advocates have been acting solely under the instructions of the Defendant to defend the Plaintiff in the said Eldoret CMCC No. 206 of 2020 Patrick Kiprotich Kigen vs Upper Hill Transporters Ltd.
12. She deponed further that it is not in dispute that Judgment was entered in favour of the Interested Party, that the Plaintiff had insured the motor vehicle with the Defendant, and that at the time of the accident the insurance policy was still valid. According to her, the instant Application is therefore merited and properly before Court as it seeks to ensure that the Interested Party realizes the fruits of his Judgment which ought to be satisfied by the Defendant. She reiterated that Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* provides for the duty of an insurer to settle a decretal amount and that since the Plaintiff had insured the motor vehicle with the Defendant as at the time of the accident, the above provisions require the Defendant to settle the decree and that the Defendant had already demonstrated that it should be the one to satisfy the Judgment by appointing a firm of Advocates to represent the Plaintiff in the primary suit.
13. She deponed further that the Plaintiff has never had the intention of denying and/or delaying the Interested Party from realizing the fruits of his Judgment but it has all along been genuinely under the impression that the Defendant would settle the claim as it has always been active in participating and representing the Plaintiff in the said suit. She added that if the interim prayer for stay of execution is not granted, this suit will be reduced to a mere academic exercise and the Court will be assisting the Defendant to avoid a contract whose terms are dictated by statute, to compensate the Interested Party. She further deponed that if the stay is not granted, the Plaintiff will have been permanently ruined since its property will have been sold in satisfaction of a huge decretal sum whereas it took out a mandatory insurance policy with the Defendant for the very purpose of the Defendant paying liabilities which arose from use of the said motor vehicle and which policy of insurance the Plaintiff is seeking to enforce vide this suit.



Hearing of the Application

14. It was agreed, and I directed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the Plaintiff filed his Submissions on 24/10/2023 while the Defendant filed on 3/11/2023.

Plaintiff's Submissions

15. Counsel for the Plaintiff submitted that Courts have found that the applicable principle in cases of stay pending hearing and determination of a declaratory suit is similar to one for stay pending appeal where one needs to satisfy the Court that the suit in existence is an arguable one with high chances of success. He cited the case of *Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & another* [2014] eKLR. He submitted that based on the facts deponed in the Affidavits, the Plaintiff has proved a prima facie case against the Defendant based on the provisions of the *Insurance Motor Vehicle (Third Party Risks) Act* Cap 405. He cited the case of *Isaack Wakoli v Xplico Insurance Company* [2021] eKLR. Counsel argued further that from the above decisions, it is clear that the insurer is mandated to respect the provisions under the law, to avoid a situation where the legal provision may not serve its intended purpose. He also cited the case of *Escolgne Properties Ltd-Vs-I.R. Commissioners* (15) [1958] A.C at 565.
16. Counsel submitted that in the present case it is not in dispute that the Plaintiff had insured the motor vehicle with the Defendant and that at the time of the accident the insurance policy was still valid. He urged the Court to allow the Plaintiff to prove its case against the Defendant by granting the stay order. He cited the case of *Xplico Insurance Company Limited vs. Mary Nthambi Mutua* [2019] eKLR, where the Court cited the decision of the Court of Appeal in the case of *Justus Mutiga & 2 Others vs. Law Society of Kenya & Another* [2018] eKLR. He argued further that the Plaintiff has shown a sufficient cause for the orders to be granted and has also demonstrated that there exists a valid insurance policy with the Defendant at the time of the accident and that is the reason why the Defendant had instructed Advocates to defend its interests in the primary suit.
17. Counsel then submitted that although it has been held that the principle applicable in such case is similar that of to stay pending appeal, cases of stay pending hearing and determination of the declaratory suit are distinguishable with that of stay pending appeal when it comes to the issue of providing security. He argued that this is because the sole purpose of filing the suit is because the Plaintiff is unable to satisfy the judgment itself hence the Defendant is the one who ought to do so. Counsel urged the Court to consider the circumstances of the case and grant stay on condition that the suit is expedited and that the parties take dates on a priority basis. He cited the case of *Charles Makenzi Wambua v Africa Merchant Assurance Co.Ltd &another* [2014] eKLR, the case of *Alois Ochieng' Ndege v Explico Insurance Company Limited; Jane Wachuka Munene (Interested Party)* [2022] eKLR and the case of *Njeru Patrick v Invesco Assurance Company Limited; Granton Ukonde Mulala (Inferested Party)* [2021] eKLR.
18. In conclusion, Counsel urged the Court to consider the reasoning in the said case of *Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd* (*supra*) where the Court stated that if stay is not granted, then the Court will be assisting the Defendant to avoid a contract whose terms are dictated by statute, to compensate the interested parties.

Interested Party's Submissions

19. Counsel for the Interested Party submitted that grant of an order of stay of execution of a decree is governed by Order 22 Rule 22 of the *Civil Procedure Rules*. He also submitted that the Courts



have found that the applicable principles and conditions are similar to those for stay pending Appeal. He submitted further that the Plaintiff has not satisfied the applicable conditions and has not demonstrated what substantial loss it will suffer if stay is not granted as it is not enough to put forward mere assertions of substantial loss without any evidence to support such. Counsel cited the case of *Kassam Hauliers Limited V Mezgebu Gatachew Mammo* [2022] eKLR.

20. He contended that the Interested Party has a right to enforce his judgment and allowing the instant Application will only delay execution, that the Plaintiff's intention is to hinder the Interested Party from enjoying the fruits of his judgment, and that the Plaintiff can still make the payments to the Interested Party and pursue a refund from the Defendant directly. He argued further that the Interested Party was never privy to the contract between the Plaintiff and its insurer (Defendant). He again cited the case of *Kassam Hauliers Limited v Mezgebu Gatachew Mammo* (*supra*). On security for the decree, Counsel cited the case of *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another* [2018] eKLR and submitted that the Plaintiff has not offered to make any provision for security provision of security for the due performance of the decree yet the law is clear that such is a mandatory requirement for grant of orders of stay.

Determination

21. The issue that arises herein is “whether an order of stay of execution should be issued to the insured staying execution of the Judgment obtained by the Interested party against the insured, pending the hearing and determination of the insured’s declaratory suit against the insurer”.
22. What the Plaintiff seeks is to stay execution of the Decree issued in the primary suit pending the determination of this suit. This is not an appeal and therefore the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* governing stay of execution pending appeal are not applicable. I believe it is for this reason that the application is predicated, inter alia, upon Order 22 Rule 22 of the *Civil Procedure Rules* which provides as follows:

“Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.”
23. I have not seen any Statement of Defence filed by the Defendant so far and as aforesaid, the Defendant also did not file any Replying Affidavit to the instant Application, In the circumstances, there is nothing to show that the Defendant disputes the allegation that the Plaintiff is the judgement debtor in the primary suit where the Interested Party is the decree holder. The Plaintiff contends that the Defendant was the insurer of the motor vehicle which caused the accident the subject of that primary suit. That contention is not challenged by the Defendant herein. The Plaintiff seeks orders that the Defendant be compelled to meet its obligations under the contract of insurance by satisfying the said Decree. In the meantime, the Plaintiff seeks orders staying the execution of the Decree. There is no doubt that the order of stay, if granted, will affect the interests of the Interested Party herein.
24. Notably, whereas an insured may well be entitled to seek a declaration that its insurer is entitled to settle the claims covered under the insurance policy, that statutory right of action does not bar a holder of a Judgment against the insured from directly executing the decree issued in his favour against the insured.
25. The Plaintiff has demonstrated that it took out a policy with the Defendant in respect of the motor vehicle, and although the Plaintiff did not avail a copy of the policy or a certificate of insurance, the police abstract exhibited bears the Policy Number 001/08711/1/002740209 issued by Trident



Insurance Co. Ltd. The abstract further shows that the said policy commenced on 14/3/2019 and was to expire on 13/03/2020.

26. The Plaintiff's cause of action is therefore anchored on the provisions of Section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act* which provides as follows:

“ 10. Duty of insurer to satisfy judgments against persons insured

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.”

27. From a reading of the Section, it would appear that the Plaintiff has a genuine cause for complaint, for that provision gives it a definite cause of action against the insurer. I am therefore convinced that the Plaintiff has demonstrated, on a prima facie basis, that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. It is unfortunate that the Interested Party, a holder of a lawful Judgment finds himself caught up in the tussle between the Plaintiff and the Defendant yet it is not even privity to the insurance contract between those two.

28. However, the Plaintiff has demonstrated that its property is on the verge of being sold in execution of the lower Court's decree. The Plaintiff is in effect seeking that the Defendant pays the Interested Party the sum due to the Interested Party from the Plaintiff. I am persuaded that unless a measure of protection is given, the Plaintiff stands to suffer irreparably should its attached property be sold in execution. I agree with the position taken by Hon. Omondi, J. (as she then was) in *Apollo Ogunda vs. Africa Merchant Assurance Co. Ltd & 4 Others* (*supra*) that:

“The tragedy and prejudice is that, were this suit against the Respondents to succeed, and were this Court to find that the Respondent has no basis for repudiating the contract, then I don't think the Applicant would even have a way of recovering the property which will already have been sold to satisfy the judgment on CMCC No. 666 of 2011.”

29. However, I must state that the primary obligation of settling the decree falls squarely on the Plaintiff and in the event that the Defendant, as the insurer, fails to satisfy the decree, the Plaintiff may still be called upon to satisfy the same. 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. It must also be noted that nothing prevents the Plaintiff from settling the decretal sum and then suing the Defendant for compensation or reimbursement. Indeed, there are several authorities to this effect. In the circumstances, even if the Plaintiff were to succeed against the Defendant at the trial, the Plaintiff may have an uphill task at the trial to convince the Court to permanently bar the Interested Party from pursuing the Plaintiff for payment of the Decree. I trust the Plaintiff's legal team is well prepared for that assignment.

30. In the end, this Court find that in these circumstances, justice would be done to the parties if an order of stay of execution of the decree in the primary suit is issued. I agree that grant of an order of stay



may inconvenience the Interested Party as it will delay his enjoyment of the fruits of his Judgment. Hopefully, the same will only be for a short time. Declining to grant the stay will mean that the Plaintiff will risk suffering immense prejudice should its attached property be sold in execution in respect of a peril for which it took out an insurance cover with the Defendant. In the light of the foregoing, I am satisfied that the instant Application is meritorious and I will therefore grant it.

31. However, since the Interested Party has a lawful Judgment in his favour and is being kept away from enjoying the fruits of such Judgment, I believe it is only fair that a balance be made between the interests of the Plaintiff and the interests of the Interested Party. In the circumstances, I agree with the Interested Party's assertion that the Plaintiff should deposit some security for performance should this suit not succeed. I am not persuaded by the Plaintiff's counter-argument that it should not be ordered to deposit security simply because it is the Defendant who has the obligation to settle the Decree.
32. I note that the Warrants of Attachment exhibited and dated 6/04/2023 indicates that the decretal sum as at that date was Kshs 710,901.54. To be fair to both sides, as a condition for grant of the orders of stay, I will fix a condition that the Plaintiff deposits an amount of Kshs 400,000/- as security.
33. I may mention that even as I grant the prayer for stay of execution herein, I am aware of various High Court authorities to the effect that an applicant such as herein is not seeking judgment against the interested party but seeking judgment against its insurer, the Defendant, that there is no judgment which the insurer has obtained against the applicant which is sought to be stayed in the proceedings, that whereas an insured may well be entitled to seek a declaration that its insurer is entitled to settle the claims covered under the insurance policy, that statutory right of action does not bar a person who is injured from executing the decree issued in his favour against the insured directly. For this reason, some Courts have declined to entertain such claims and/or to grant stay of execution. I have in mind authorities such as the following:
 - i. *Jenipher Anyango Oloo v Buzeki Enterprises Limited & Another* [2021] eKLR, (Aburili J),
 - ii. *Dolk Limited v Invesco Assurance Company Limited & 5 Others* [2018] eKLR, Odunga J (as he then was).
 - iii. *Muthuri Ntara & Another v Francis Mworio Igweta* [2016] eKLR (Gikonyo J).
 - iv. *In the matter of Blue Shield Limited (Under Statutory Management)* 2017 eKLR (L. Njuguna J).
 - v. *In the Matter of Concord Insurance Company* (2014) eKLR (Gikonyo J)
 - vi. *George Ngure Kariuki Vs. Charles Ogoro Makone & Another* (2014) eKLR (L. Njuguna J)
 - vii. *Jane Wanjiru Mwangi v Explico Insurance Company Limited: Duncan Odhiambo Owino (Interested Party/Respondent)* [2021] eKLR (Mboghohi-Msagha J).
 - viii. *Peter Kilonzo Kioko v Monarch Insurance Co. Ltd; Kisakwa Ndolo King'oku (Sued as Legal Representative of the Estate of Mwanja Kisakwa - Deceased (Interested Party))* [2021] eKLR (Odunga J, as he then was)
 - ix. *James Ng'ang'a Njenga V Commissioner of Insurance & 3 Others* [2011] eKLR, in (W. Karanja J).
 - x. *Kensilver Express Ltd & 3 Others V Commissioner of Insurance & 4 others* [2007] eKLR (Angawa J).



34. For me, since the above decisions are not binding on this Court, being decisions of Courts of equal jurisdiction status, and although quite forceful and persuasive, rather than shut out the Plaintiff at this early stage, I will grant the Plaintiff its day in Court so as to give it an opportunity to persuade or convince this Court to depart from the said authorities and rule otherwise.

Final Orders

35. In the premises, I order as follows:

- i. The Plaintiff's Notice of Motion dated 25/05/2023 is hereby allowed in terms of prayers 3 and 4 thereof.
- ii. Accordingly, an order of stay of execution of the Judgment and/or Decree issued in Eldoret CMCC No. 206 of 2020, including stay of the Warrants of Attachment issued to Messrs Icon Auctioneers, is hereby granted pending the hearing and determination of this suit.
- iii. As a condition for the orders of stay granted in (i) and (ii) above, the Plaintiff shall, within a period of 45 days, deposit a sum of Kshs 400,000/ in an interest earning bank account to be opened in the joint names of the Advocates on record for the Plaintiff and for the Interested Party, respectively, in a bank to be agreed. In default, the orders of stay shall lapse and the Interested Party shall be at liberty to proceed with execution.
- iv. To fast track the hearing and determination of this suit, and considering the nature thereof, the parties to consider doing away with the necessity of *viva voce* taking of evidence and consider, instead, canvassing the suit by way of documents only.
- v. The costs of the Application shall be in the Cause.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF JUNE 2024

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WANANDA J. R. ANURO

JUDGE

Delivered in the Presence of:

Ms. Tallam h/b for Ms. Jeruto for Interested Party

N/A for other parties

N/A for other parties

