



**Kithuka v Insurance Regulatory Authority & 2 others; Mboya & Mbiti (Suing as the Legal Representative of the Estate of Mboya Mbiti - Deceased) (Interested Party) (Petition E004 of 2024) [2024] KEHC 8635 (KLR) (17 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8635 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
PETITION E004 OF 2024**

**RK LIMO, J  
JULY 17, 2024**

**AND IN THE MATTER OF SECTION 4, 10 OF THE INSURANCE (MOTOR VEHICLES THIRD PARTY RISKS) ACT CAP 405 THE LAWS OF KENYA**

**BETWEEN**

**MUTIE KITHUKA ..... PETITIONER**

**AND**

**INSURANCE REGULATORY AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**TRIDENT INSURANCE COMPANY LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**TABITHA NGEMA MBOYA & SAKAYO MBITI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MBOYA MBITI - DECEASED) ..... INTERESTED PARTY**

**RULING**

1. Mutie Kithuka, the Petitioner/Applicant herein has moved this court through a Notice of Motion dated 2<sup>nd</sup> July 2024 for the following orders, namely;
  - i. Spent
  - ii. That there be a Stay of Execution of Judgement/decree in Kitui CMCC No. E052 of 2020 pending the hearing and determination of the application herein.
  - iii. That there be a Stay of Notice to Show Cause slated for 4<sup>th</sup> July 2024 in respect of Kitui CMCC Civil Case No. E052 of 2020 pending the hearing and determination of the application herein.



- iv. That this Hon. Court be pleased to order stay of execution of decree in respect to Kitui CMCC No. E052 of 2020 pending the hearing and determination of the petition herein.
  - v. That this court be pleased to issue any other order it may deem appropriate.
  - vi. Cost of this application.
2. The Applicant has cited the following grounds on the fall of her application;
- a. That he was at all material times the owner of Motor Vehicle Registration No. KBP 981P (herein after to be referred on as the subject Motor vehicle for ease of reference) and had insured it with the 3<sup>rd</sup> Respondent vide Policy No. 120/090/1/212444/2019.
  - b. That the subject vehicle was involved in a road traffic accident along Kitui-Mutomo road on 13<sup>th</sup> January 2020 wherein the deceased (represented by Interested Party) sustained fatal injuries.
  - c. That the Interested Parties instructed Kitui CM's court Civil Case No. E052 of 2020 (hereinafter to be referred to as the primary suit for ease of reference).
  - d. That the Applicant presented the plaint and summon to enter appearance to his insurer the 3<sup>rd</sup> Respondent herein.
  - e. That the primary suit was heard and Judgment entered against with the Interested Party being awarded Kshs. 6,877,814/=.
  - f. That the Interested Party has commenced execution and attached the subject Motor Vehicle and sold it through public auction realizing only Kshs. 200,000/= which could not satisfy the decree.
  - g. That a Notice to Show Cause has been served on him requesting him to show cause on 4<sup>th</sup> July 2024 in the primary suit.
  - h. That the 3<sup>rd</sup> Respondent has not taken any steps to protect him or his interests stating that the application dated 5<sup>th</sup> June 2024 to set aside Judgement and two other applications dated 19<sup>th</sup> February 2024 and 27<sup>th</sup> March 2024 were fruitless.
  - i. That the 3<sup>rd</sup> Respondent has not honoured the terms of policy of insurance thus exposing his to civil jail.
  - j. That he earns net salary of Kshs. 23,000/= as a P1 teacher and thus he is unable to satisfy the decree in his own and that he stands to suffer substantial and irreparable loss unless Notice to Show Cause is stayed.
3. In his oral submissions through his learned counsel Mr. Kitindio, the Applicant faulted the 3<sup>rd</sup> Respondent for violating his rights by failing to provide cover as per the insurance policy.
4. He also faulted the insurer (3<sup>rd</sup> Respondent) for not defending the primary suit and claims that amount awarded in the said suit was high because it was undefended.
5. He also contends that the 3<sup>rd</sup> Respondent further failed him by not complying with the conditions given in the primary suit to set aside the Judgment.
6. He further faults the 3<sup>rd</sup> Respondent for not appealing against the high award and the Judgment adding that there were glaring errors in the Judgment. He contends that the multiplicand used to assess loss



- of dependency was erroneous because 16 years was used instead of 11 years given that the deceased was aged 49 years at the material time.
7. He maintains that the petition filed herein is meant to enforce his rights which he claims have been infringed by the 3<sup>rd</sup> Respondent. He submits that the Interested Party is also a victim of the alleged infringements.
  8. He points out that the 3<sup>rd</sup> Respondent has not entered appearance or participated in the proceedings herein because they are at fault of not protecting him. He urges this court to stay the proceedings in the primary suit.
  9. The Interested Parties have opposed this application through a replying affidavit sworn by Tabitha Mboya on 3<sup>rd</sup> July 2024. They term this application as afterthought and contend that Judgment in the primary was entered on 20<sup>th</sup> January 2023 and the Applicant all along has been aware of the same.
  10. They contend that the Petitioner's advocate was duly appointed by his insurer and the Lawyers have actively participated in all proceedings.
  11. They term this application and the petition as attempt to frustrate their efforts to get compensation for the deceased and his estate.
  12. They term this application an abuse of court process citing that a similar application vide Kitui HC Misc App No. E007 of 2024 which they aver was dismissed by this court on 28<sup>th</sup> February 2024. They have exhibited a copy of the said application to back up their contention.
  13. They contend that neither execution nor the process thereof has been challenged by the Applicant.
  14. They argue that the decretal sum is Kshs. 6,870,714/= out of which the insurance is only liable to pay Kshs. 3 million. They therefore contend that even if the insurance were to pay Kshs. 3 million there will still be a balance to be paid and as such there would be no basis for stay of execution.
  15. They fault the Applicant stating that he is engaged in abusing the court process by engaging in application for stay in both the lower court and this court. They contend that the Applicant is only out to delay their fruits of Judgment by taking them in endless circles both in this court and lower court.
  16. Through their learned counsel M/s Mbilo, the Respondents contend that the Judgment in the primary suit has not been challenged either on appeal or review.
  17. They claim that the fight in this petition is between the Petitioner and his insurer. They submit that they are not party to their differences and should not be dragged into it or be prejudiced as a result. They point out that the Petitioner has not filed a declaratory suit against the 3<sup>rd</sup> Respondent and contends that there is no basis for this court to grant a stay.
  18. This court has considered this application and the response made. The Applicant is a seeking stay of execution and stay of proceedings. He has invoked the provisions of Order 22 Rule 22 & 25, Order 51 Rule 1, Sections 1A & 1B of the *Civil Procedure Act* and Articles 159 of *the Constitution* of Kenya. The provisions of Order 22 Rule 22 & 25 refers to situations when the court that passed the decree can stay execution. That provision does not apply to the situation in this instance because the decree sought to be stayed was passed in the trial court and this court's appellate jurisdiction in respect to stay under Order 42 Civil Procedure Rules has not been invoked and cannot even apply because there is no appeal pending.
  19. The provisions of Section 1A and 1B of the *Civil Procedure Act* relate to the overriding objective of *Civil Procedure Act* which is the duty of this court to facilitate just, expeditious, proportionate and



affordable resolution of disputes in efficient, timely and just manner. The Applicant has not provided the nexus between his application for stay and stay of proceedings and the provisions of Sections 1A & 1B of the Civil Procedure Act.

20. The cited provisions of Article 159 of the Constitution provide where the judicial authority of this court emanates from and where it rests it is derived from the people and rests in court. Article 159 (2) further provides for how the judicial authority should be exercised and principles guiding courts in the exercise of that power. The Applicant has again failed to show the connection between the prayers sought in this application and the provisions of Article 159 of the Constitution of Kenya.
21. The Applicant is seeking a stay of proceedings and execution and though he has not cited a relevant provision, he claims that because he has a pending petition between him and the Respondents, a stay be granted in the primary suit pending in the trial court.
22. This court has looked at the grounds of opposition. The Interested Party has opposed this application and have raised a significant point which is the fact that there was a similar application filed vide Misc App. No. E007 of 2024 and that a ruling was made disallowing the application.
23. The Applicant has exhibited the copy of the application dated 22<sup>nd</sup> February 2024 and the Applicant was seeking a stay of execution in Kitui CMCC No. E52 of 2020 amongst other prayers so if the court rendered itself on the question of stay of execution, then the doctrine of res-judicata would kick in. The Interested Party has not enclosed the copy of the ruling but this court takes judicial notice on the basis of my memory that I dealt with the matter sometime in the end of February 2024 in the open court.
24. Moreover, the other issue pointed out which is the fact that under Section 5(2) of the Insurance (Motor Vehicle Third Party Risks) Act, an insurer is only liable to pay up to Kshs. 3 million in a claim, the Applicant is liable to pay or meet the balance of decretal sum. The decretal sum here is Kshs. 6,870,714/= . The Applicant is required to pay the balance of Kshs. 3,870,714/= and he has not contested the sum either on appeal or review. There is absolutely no basis to ask this court to stay execution of a sum that is not disputed.
25. Finally, the Interested Party is not at fault and has not been faulted in the execution process or in this petition. The applicant has pointed fingers at the Respondents and not the Interested Party who stands to be prejudiced by the orders sought. This court finds no sufficient cause to warrant the same.

In the premises, this court finds no merit in the application dated 2<sup>nd</sup> July 2024. The same is dismissed with costs to the Interested Party.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 17<sup>TH</sup> DAY OF JULY 2024.**

**HON. JUSTICE R. LIMO**

**JUDGE**

