



REPUBLIC OF KENYA



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**Kimani v Monarch Insurance Company Limited; Muigai (Interested Party)
(Civil Suit E009 of 2024) [2024] KEHC 8362 (KLR) (3 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8362 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT E009 OF 2024
HM NYAGA, J
JULY 3, 2024**

BETWEEN

MARTIN MBUGUA KIMANI PLAINTIFF

AND

THE MONARCH INSURANCE COMPANY LIMITED DEFENDANT

AND

DAVID GATIBA MUIGAI INTERESTED PARTY

RULING

1. The applicant vide a Notice of Motion dated 12th March, 2024 brought under Section 1A, 1B & 3A of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules seeks for the following orders;
 - i. Spent.
 - ii. Spent
 - iii. Spent
 - iv. That pending the hearing and determination of this suit, there be a stay of execution in Nakuru CMCC Nos. 1107 of 2019- David Gatiba Muigai vs Martin Mbugua Kimani & 3 others.
 - v. That pending the hearing and determination of this suit, there be a stay of further proceedings in Nakuru CMCC Nos. 1107 of 2019 - David Gatiba Muigai vs Martin Mbugua Kimani & 3 others.
 - vi. That this Honourable Court be pleased to issue such other or further directions as may be appropriate.
 - vii. That the costs hereof be borne by the defendant.



2. The application is premised on grounds;
 - a. That at all material times relevant to this suit, the plaintiff was the lawful owner of motor vehicle registration number KBY 648 G AD NISSAN and had insured the said vehicle with the defendant under policy number NKR/0700/000351/2014 commencing 25th June,2018 and expiring on 24th June,2019, that it was a term of the said policy/contract of insurance between the plaintiff and the defendant express and or implied that the defendant would indemnify the plaintiff in respect of any claim respecting death or bodily injury respecting any passenger being carried on the said vehicle, alighting therefrom, boarding thereon or any pedestrian or third party vehicle that would come into contact with the said vehicle leading to death, injury or any other form of damage to the said third parties.
 - b. That it was also a term of the said policy/contract of insurance between the plaintiff and the defendant express and or implied that the defendant would settle all claims and or judgments respecting any injury, death or material damage of a third party arising from an accident respecting the said motor vehicle.
 - c. It was also a term of the said policy or contract of insurance between the plaintiff and the defendant express and or implied that the defendant would offer legal representation to the plaintiff in respect of any suit filed in any court representing any claim arising from the said motor vehicle.
3. The plaintiff further avers that he paid all premiums to the defendant as and when they fell due and paid all excess fees and all charges due to the defendant as and when they fell due. That on 24th May, 2019 during the pendency of the contract/policy of insurance between the plaintiff and the defendant, the aforesaid Motor Vehicle Registration Number KBY 648 G AD NISSAN was involved in an accident along Nairobi-Nakuru near Laikipia Campus between it and Motor Vehicle Registration No. KBZ 571 V being driven by the interested party David Gatiba Muigai as a result of which the said interested party sustained grievous injuries as a result of which the said interested party herein filed Nakuru CMCC No. 1107 of 2019 against the plaintiff.
4. It is also averred that the defendant herein appointed M/s Githiru & Co. Advocates to defend the plaintiff in the said matter, and Judgement was eventually entered against the plaintiff in the said case for a cumulative sum of Kshs. 3,369,027.60. That after the entry of the said judgement, it became apparent that the defendant had no intention of settling the same despite issuance of warrants of attachment and arrests against the plaintiff in the said suit.
5. The plaintiff further avers that on 8th December,2023, the defendant purported to enter into a consent with the interested party for payment of the decretal sum in the said suit by instalments which instalments the defendant has defaulted on.
6. That the defendant has taken no action despite the risk of incarceration of the plaintiff in GK Prison Nakuru for a Civil Debt and attachment of the Plaintiff's properties in settlement of the civil debt whose contractual obligation to settle lies with the defendant.
7. The plaintiff avers that he runs the risk of incarceration in prison for the said debt and also the risk of being rendered completely bankrupt and destitute through attachments and executions unless the defendant meet its obligations under the contract or policy of insurance. That the plaintiff was also entitled to legal representation at Defendant's expense and it was impermissible for the defendant to literally rob the plaintiff by collecting premiums, excess fees and other charges then fail to meet



its obligation of satisfying judgment against her thereby exposing the plaintiff to untold suffering including incarceration to civil jail and attachments that would completely ruin the plaintiff.

8. The plaintiff also avers that the court has discretion to protect the insuring public from a rogue practice where insurance companies collect premiums, excess fees and other charges from the public then leave the insured to be incarcerated in civil jail, face auctioneers and be bankrupted as if the same is not their business.
9. In the annexed affidavit of Martin Mbugua Kimani sworn in support of the application, he reiterates the grounds on the face of the application and attached copies of Police Abstract as Exhibit 1, pleadings in the aforesaid lower court matter Exhibit 2, copy of the defence and correspondence from the firm of M/S Githiru & Co. Advocates as Exhibit 3, copy of warrants of attachment as Exhibit 4, copy of consent entered between the defendant and the interested party for payment of the decretal sum in the lower suit vide instalments and copies of the post-dated cheques from March 2023 to August 2023 in favour of the interested party's advocates as Exhibit 5 and 6 respectively and annexed authorities pronouncing that rogue practice by insurance companies must stop and execution be levied against the said insurance companies as Exhibits 7.
10. The Respondent did not file their response despite being granted 14 days to do so by this Honourable Court on 22nd April, 2024.

Submissions

11. Only the Applicant filed his submissions.
12. The Applicant submitted that pursuant to Sections 5 and 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405, the Defendant is obliged in law to pay the decretal sums awarded to the interested party. However, in this case, he has been abandoned by the Defendant and left to shoulder the obligation that is legally meant to be satisfied by the Defendant.
13. The Applicant argued that the nature of Insurance contract is that the insurer is obligated to compensate any injured person or victims thereof as a result of an accident relating to the insured vehicle. In buttressing his submission, the Applicant relied on the following cases;
 - i. *Pacis Insurance Company Limited vs Mohamed F. Hussein* [2016] eKLR for the proposition that an insurer can only escape responsibility if the contract itself is voidable and has been avoided.
 - ii. *Apollo Ogunda vs Africa Merchant Assurance Co. Ltd & 4 others* [2015] eKLR where execution was stayed in the parent suits Nakuru CMCC No. 666 of 2071, and stayed proceedings in Nakuru CMCC Nos. 254, 258 and 1186 all of 2017 filed against the insured (plaintiff) pending the hearing of the said suit Nakuru HCCC No. 100 of 2013 by the insured plaintiff who had sought a declaration that judgment in the said suits be satisfied by his insurer M/s Africa Merchant Assurance Co. Ltd.
 - iii. *Fredrick Gathungu Njenga vs Africa Merchant Assurance Co. Ltd. & Others* Nakuru HCCC No. 65 of 2015 where similar stay orders were made in Nakuru CMCC No, 549 of 2017 pending the hearing and determination of the case Nakuru HCCC No. 65 of 2015 seeking a declaration that the defendant the plaintiff's insurer was obligated to satisfy the said judgment in the parent suit
 - iv. *Samuel Githinji Mwangi vs Xplic Insurance Co. Ltd. & Others* Nakuru HCCC No. 12 of 2017 where the court stayed execution in Nakuru CMCC No. 948 of 2015 (parent suit)



a compensatory suit against the plaintiff the insured pending hearing and determination of the suit Nakuru HCCC No. 12 of 2017 a suit seeking a declaration that the parent suit (compensatory suit) should be satisfied by the plaintiff's insurers the defendant therein.

- v. Gerald Wachira T/A Wachira, Sawmills vs Blue Shield Insurance Co. Ltd where it was declared that the defendant was bound to satisfy judgement in the parent suit Molo SRMCC NO. 231 OF 1994 which had been filed against the insured plaintiff as it was contractual obligation of the said insurer to satisfy the judgement on behalf of the plaintiff.
- vi. Rose Wairimu v Xplico Insurance Company Limited; Joyce Njeri (suing as the mother and next Friend of Mary Njeri) & 10 others (Interested parties) [2021] eKLR where the court in determining a similar application such as this opined that;

“It is only fair in a case such as this where the applicant has demonstrated prima facie that she paid the insurance premiums and had a valid certificate of insurance at the material time. It is my considered view that it would not be appropriate to order the applicant to deposit the entire decretal sum pending the hearing of suit.”

- 14. The Applicant posited that he has invoked the aid of this Honourable Court for protection of not only his rights under the Insurance Contract but also his constitutionally protected right to liberty. In support of this position, reliance was placed on the case of Christopher Ndarathi Murungaru vs Kenya Anti-Corruption Commission & another [2006] eKLR.

Analysis & Determination

- 15. I have considered the Application and the supporting affidavit together with annexures thereto.
- 16. The single issue for determination is whether the Court should the orders sought. That is to say, should this court stay a lawful decree of the primary suit pending determination of this suit?
- 17. In this case it is not disputed that the Plaintiff/Applicant is the judgement debtor in the primary suit whereas the Interested Party is the decree holder.
- 18. The Applicant seeks stay execution of the decree in the primary suit pending the determination of this suit. It is not disputed that the applicant's motor vehicle was insured by the defendant/ respondent at the time of the accident.
- 19. As seen from the cases cited by the applicant, there has been a lot of litigation over the issue now before this Court.
- 20. What is clear is that there is a variance of findings by the High Court on whether such an application or suit can succeed. Some courts have found merit in such applications while others have not. The ones cited by the applicant appear to be in favour of granting such prayers as those sought by the applicant herein.
- 21. In addition, there are more findings on the same issue by the other courts. For instance, in Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & Another [2014] eKLR the court stated as follows:

“Secondly, that unless such stay is granted, the intended suit shall be rendered nugatory. In my analysis, I have found that if stay is not granted, the court will be assisting the defendant to avoid a contract whose terms are dictated by statute, to compensate the interested parties herein then revert to the plaintiff to recoup any extra sums that they may have paid to



third(interested) parties...I must also consider whether granting the stay sought will in any way prejudice the interested parties who have opposed this application. The interested parties being persons covered under Section 4 (1) of the Act-Cap 405 Laws of Kenya, the liability of the defendant is preserved as against them and they could as well, sue the defendant by way of a declaratory suit to recover the sums due as per the decrees in their favor...However, the plaintiff has opted to carry that burden on their behalf. If the suit herein is determined in favor of the plaintiff, then the interested parties stand to benefit directly. They need not file any other declaratory suit against the defendant. For that reason, therefore, time and resources, will also be saved for the interested parties. Therefore, no prejudice will be caused to them.”

Another illustration is the case of Alois Ochieng Ndege vs. Explico Insurance Co. Ltd. vs. Jane Wachuka Munene (Interested Party) (2022) eKLR where it was held that:

“Upon considering the rival positions above, I am of the view that in the circumstances of this case, the plaintiff has reasonably demonstrated the manner in which he stands to suffer substantial loss if an order for a stay of execution is denied. However, it is noteworthy that upon considering the interest of the interested party who already has a judgment in her favor of which she is entitled to enjoy the fruits, it is imperative for the hearing and prosecution of the declaratory suit to be expedited.”

Reference can also be made to Njeru Patrick Vs. Invesco Assurance Co. Ltd. (2021) eKLR where the Court stated that:

“It is my view 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 Applicant prosecute his case. Accordingly, I hereby grant an order staying execution in Kithimani PMCC No. 317 of 2016 pending the determination of this suit on condition that the Plaintiff/Applicant secures a bank guarantee or any other form of security, movable or immovable, for the said decretal sum as security for the due performance of the decree or order as may be ultimately be binding on him within 30 days of this order. In default the stay will automatically lapse.”

22. On the flip side, there are other courts that have found that such applications and suits are not tenable. A few examples include;

a. Dollk Limited Vs Invesco Assurance Co. Ltd. & Others (2018) eKLR where it was held that: -

“It follows that this suit does not meet the test of a subrogation suit. However, 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 its favour against the insured directly.”

b. Jane Wanjiru Mwangi Vs. Xplico Insurance Co. Ltd. & Another (2021) eKLR where the Court held that: -

i. “It is clear from the motion that the order sought is that a stay of execution of the judgment in the primary suit pending the hearing of the declaratory suit and that the said motion is predicated on the provisions of Sections 1A & 1B, 3, 3A and 63 (e) of the *Civil Procedure Act*; Article 159 (2) of *the Constitution*; and Order 51, Rules 1, 3 and 4 of the Civil Procedure Rules.



- ii. Upon consideration of the cited provisions, I observed that none of them necessarily cater for a situation touching on a stay of execution of a decree pending the hearing and determination of an entirely new suit.
 - iii. It is apparent the applicant is seeking a declaratory judgment against the defendant, her alleged insurer, and not against the interested party. It is also apparent that the judgment delivered in the primary suit has not been challenged by way of an appeal or review.
 - iv. That notwithstanding, I find that while the applicant is entitled to file a declaratory suit against the defendant pursuant to the provisions of the *Insurance (Motor Vehicles Third Party Risks) Act*, in a bid to have the insurer settle any pending claims arising out of an insurance policy entered into between an insurer and its insured, this does not necessarily bar a decree holder from pursuing the decretal sum from an insured person, such as the applicant in this instance. This position is supported by the case of *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* in which the court determined thus:
 - 1. “The applicant herein is not seeking judgment against the interested party. It is seeking judgment against its insurer, the Defendant. There is no judgment which the insurer has obtained against the applicant which is sought to be stayed in these proceedings...However, 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.”
 - v. I am convinced that even after the applicant herein satisfies the decretal sum in the primary suit, she can still pursue the present declaratory suit against the defendant and seek compensation therefrom. In my view, it would not be in the interest of justice to hinder the respondent from realizing the fruits of his judgment.”
- c. *Buzeki Interprises Ltd Vs African Merchant Assurance Ltd (2021) eKLR* where the Court held that:
- i. “That aside, I observe that the trial court proceeded to entertain the application dated 20.12.2018, yet the provisions of section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act do not provide for stay of execution. The said section provides that:
 - ii. 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.
 - iii. The 1st respondent was thus justified in seeking a declaratory judgment against the 2nd respondent, its alleged insurer. I also note that the judgment delivered in the Siaya



PMCC 75 of 2016 has not been challenged by way of an appeal or review. However, whereas an insured may well be entitled to file for a declaration that its insurer is obliged to settle decree against the insured under the insurance policy, that statutory right of action does not bar a person who is injured from executing the decree issued in its favour against the insured directly as was held in the case of Dolk Limited (supra).

- iv. In the circumstances, it is my view that the trial court erred in staying execution of decree issued in favour of the appellant against the 1st Respondent insured, pending the hearing and determination of the declaratory suit. This is because the application dated 20.12.2018 was firstly, res judicata the application dated 24.9.2018 filed by the 1st respondent in Siaya PMCC 75 of 2016 and secondly, because the filing of a declaratory suit is no bar to execution of decree by a genuine decree holder.
 - v. In the end, I find and hold that the trial Magistrate erred in granting stay of execution of decree in Siaya PMCC No. 75 of 2016 by a ruling delivered on the 27.6.2019 in Siaya Principal Magistrates Court Civil Case No. 36 of 2019. I allow this appeal, set aside and vacate the orders issued on 27/6/2019 by Hon James Ongondo, Principal Magistrate and substitute them with an order dismissing the application dated 20th December, 2018. The appellant shall have costs of this appeal and of the application in the lower court, giving rise to this appeal.”
- d. Stephen Amollo Odhiambo Vs Monarch Insurance (2022) KEHC 15610 (KLR) where it was held that:
- i. “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.
 - ii. In addition, nothing prevents the plaintiff from settling the decretal sum and then enforcing that same decree against the Defendant for reimbursement. That in my view will not render this suit nugatory as the plaintiff can, upon settling the decree, amend his plaint and seek for reimbursement of the monies paid to the interested parties. Further, it is admitted by the plaintiff that the defendant had already started settling the decretal sum to the tune of Kshs 396,080.”
23. I will now weigh in on the issue.
24. Section 5 of the Act in question obligates all vehicles classified under the Act to take out insurance against liability by 3rd parties. The section reads as follows:
- “In order to comply with the requirements of section 4, the policy of insurance must be a policy which—
- (a) is issued by a company which is required under the *Insurance Act*, 1984 (Cap. 487) to carry on motor vehicle insurance business; and
 - (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.”



25. Section 10(1) of the Act obligates an Insurance Company to compensate any 3rd party injured or dies as a result of any accident including its insured. It reads as follows;

“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.”

26. It is pursuant to this provision that the Defendant insured the Plaintiff under the policy between them.

27. In my opinion, the law provides for the requirement that such a cover be taken out. The cover, once issued, becomes a contractual agreement between the insurer and the insured, in this case the defendant and the plaintiff herein. Therefore, the interested party has no role to play in a dispute between the Plaintiff and Defendant.

28. In Daniel Mutua Musyoki vs Amaco Insurance Company Ltd & Another (2023) eKLR, I dealt with a similar application. I found that:

“The primary duty of settling the decree falls squarely on the Applicant. In the event the 1st Respondent as his insurer fails to satisfy the decree, the Applicant will still be called upon to satisfy the same. Nothing prevents the Applicant from settling the decretal sum and then suing the Respondent for compensation or reimbursement.

In my opinion, the suit against the 2nd respondent was ill conceived. He is not privy to the contract between the applicant and the 1st Respondent, who has conveniently failed to file any response. The matter is between the applicant and its insurer. Period.

Entertaining this application and the suit for that matter will set an unacceptable precedent whereby any insured entity, on its own motion or covertly urged by its insurance company, will be moving to court to seek orders of this nature. This will defeat the purpose of the Act, which was to protect the rights of successful judgment holders in suits against a party who is insured under a policy falling within the ambit of the Act.

I am thus of the opinion that the plaintiff’s case against the 2nd respondent has any foundation in law.”

29. I wish to reiterate this as my position. In doing so I do respectfully disagree with my sister and brother judges who have held views to the contrary.

30. Let’s look at a similar scenario. Once a judgment in a primary suit is entered against defendant, the Plaintiff, on his own, has the right to file a declaratory suit against the Insured company. He cannot, in that suit, seek to join the Insured who he had sued in the primary suit. The issues between the Plaintiff and the Interested Party were determined in the primary suit and cannot be canvassed again. By the same analogy, I find that the Interested Party has no business in the suit between an Insurer and Insured.



31. Looking at the Plaintiff, there is no prayer sought against the interested party. The sole prayer is against the Defendant who has conveniently and to no surprise, failed to enter appearance or file any defence.
32. Courts must be wary of suits of this nature which have become a common occurrence. It is very likely that an insurer and an insured can collude to file a suit of this nature. Once stay is granted, the Interested Party has nowhere to turn to. He/she has no control of the suit between the plaintiff and defendant.
33. The primary responsibility of settling a decree lies with the party against whom it is issued. Dragging the Interested Party to this suit was, in my opinion, improper.
34. The next question is whether a stay ought to issue as prayed.
35. This is not an appeal against the decision in the primary suit. I don't see how a defendant can file a fresh suit and seek to stay another suit from which he never appealed.
36. I agree that Section 5 of the Act is meant to protect the insured and the 3rd party. What I don't agree with is that the said section can be used by an insured to stay a decree issued against him. He should satisfy the decree and then seek compensation from its insurer, by enforcing the contract between them.
37. It is my opinion that if such applications as the present one are to be allowed, then it is very conceivable that no judgment and decree arising out of an accident covered by an insurance company will ever be executed. Is this what the Act had in mind? I do not think so.
38. Perhaps it is time for the issue to be determined by the Court of Appeal or even the Supreme Court, so that the varying decisions can be streamlined.
39. For now, I find that the Application lacks any merit and it is dismissed with costs to the Interested Party.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 3RD DAY OF JULY, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Jamleck

Ms Chelagat for Respondent

No appearance for Applicant

