



REPUBLIC OF KENYA



**Murere v Nyongesa & another; Tumbo t/a Cresent Auctioneers (Interested Party)
(Civil Appeal 117 of 2019) [2024] KEHC 8892 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 117 OF 2019**

DK KEMEL, J

JULY 19, 2024

BETWEEN

FANUEL MURERE APPELLANT

AND

EMMAN NYONGESA & ANOTHER RESPONDENT

AND

**SAMSON ITONDE TUMBO T/A CRESENT AUCTIONEERS INTERESTED
PARTY**

RULING

1. Through a Notice of Motion application dated 12TH October 2023, the Appellant/Applicant seeks for orders of stay of execution of the Judgment and Decree in High Court Civil Appeal No. 117 of 2019 pending the hearing and determination of the Appellant/Applicant's declaratory suit against Monarch Insurance Company Limited.
2. The application is supported by the grounds on the face of it and in the Appellant/Applicant's supporting affidavit sworn by the Appellant/Applicant herein sworn on even date. The Applicant's gravamen is inter alia; that the Applicant had a valid insurance policy of insurance at the time of the accident and thus the insurer was under obligation to pay the decretal sums to the decree holder; that the Applicant has a legitimate expectation that the insure would indemnify the applicant; that the insurer has declined without justifiable explanation declined to settle the decree plus costs; that the Applicant has filed a declaratory suit against the insurer for a declaration and an order to satisfy the decretal sums; that the Applicant is apprehensive that the Respondent will proceed to execute the decree to his detriment; that unless an order of stay of execution is granted, the declaratory suit will become an academic exercise and that the Applicant will suffer great prejudice.



3. The application was strenuously opposed by the Respondent. Vide a replying affidavit sworn on 26.2.2024 the Respondent raised several issues inter alia; that they are not party to the declaratory suit and hence their rights to be heard have been curtailed; that the Respondents are not party to the agreements between the applicant and his insurers; that the alleged policy of insurance has not been annexed to the supporting affidavit; that the Respondents are entitled to the fruits of the judgement; that the Applicant had been aware of the determination of the appeal yet he has been in slumber until the Respondents began to execute the decree; that the application should be dismissed with costs.
4. The Applicant filed a supplementary affidavit sworn on 13.5.2024 wherein he averred inter alai; that he has now annexed a copy of the declaratory suit in Kimilili courts; that he has made progress in the case which is now scheduled for hearing in that court; that he has legitimate expectation that the insurer will settle the claim; that this court has unfettered discretion to grant the orders sought.
5. The application was canvassed by way of written submissions. Both parties complied.
6. The Applicant's submissions are dated 13.5.2024 wherein counsel submitted that no prejudice will be suffered by the Respondents if the order of stay of execution is granted pending determination of the declaratory suit. Counsel relied on the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules regarding stay of execution pending an appeal.
7. The Respondent's submissions are dated 15. 5. 2024 wherein learned counsel submitted that the Respondent is not a party to the declaratory suit and hence his right of being heard has been curtailed. It was further submitted that the insure was the Applicant's choice and that the Respondent is not party to the arrangement between the applicant and his insurer. It was finally submitted that the appeal was determined quite early and that the applicant went into slumber only to be woken up with execution of the decree. It was thus urged that the application ought to be dismissed with costs.
8. I have considered the rival affidavits and submissions. I find the only issue for determination is whether the application has merit.
9. It is not in dispute that the Applicant herein had lodged this appeal and that the same was finally determined vide the judgement of this court dated 18.11.2021. It is not in dispute that the said appeal was dismissed with costs to the Respondents. It is also not in dispute that the Appellant/Applicant has not preferred an appeal to the Court of Appeal. It is also not in dispute that the Applicant has not sought for an order of stay of execution pending an appeal.
10. It is noted that the Applicant upon filing a declaratory suit at Kimilili law courts, ought to have sought for an order of stay thereat but not to move to this court which is already functus officio except as regards an application for stay of execution pending an appeal. In the absence of an appeal to the Court of Appeal and in the absence of an application pending appeal, i find the present application to be improperly before the court. The proper forum for the applicant ought to be in the declaratory suit. There is no evidence that the applicant has approached the court vide the declaratory suit and that the same has been declined so as to warrant him to move to the High Court by way of an appeal. Again, there is no new appeal that has been lodged by the applicant save for the present appeal which has already been determined. As the Respondents are not parties in the declaratory suit, they stand to be prejudiced if they are prevented from enjoying the fruits of the judgement. Consequently, I find that the application has been improperly lodged in this court.
11. In view of the foregoing observations, it is my finding that the Appellant's application dated 12.10.2023 lacks merit. The same is hereby dismissed with costs to the Respondents. The earlier orders of stay are hereby vacated.



It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF JULY 2024

D. KEMEI

JUDGE

In the presence of:

Murunga for Applicant

Shikhu for Mukisu for Respondents

Kizito Court Assistant

