



REPUBLIC OF KENYA



**Ndaka v Kenya Orient Insurance Ltd & another; Mutambu (Interested Party)
(Civil Case E004 of 2024) [2024] KEHC 8451 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8451 (KLR)

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

**RK LIMO, J
JULY 11, 2024**

BETWEEN

TITUS T NDAKA PLAINTIFF

AND

KENYA ORIENT INSURANCE LTD 1ST DEFENDANT

MADISON INSURANCE COMPANY LTD 2ND DEFENDANT

AND

DENNIS MUTINDA MUTAMBU INTERESTED PARTY

RULING

1. Titus T. Ndaka, the Plaintiff herein has moved this Honorable court vide an application dated 25th April 2024 seeking inter alia stay of attachment and sale/auction of his property by the auctioneer instructed by Dennis Mutinda Mutambu, the named Interested Party herein. The application is brought under Section 3A and 63(c) of the [Civil Procedure Act](#) (Cap 21) and Order 22 Rule 22 of the [Civil Procedure Rules](#) 2010.
2. The applicant is seeking the following reliefs namely:
 - i. Spent
 - ii. That pending the hearing and determination of this application inter-parties there be a stay of attachment and sale or auction in execution of the decree in Kitui Chief Magistrate's civil case No. E.149 of 2021.
 - iii. That pending the hearing and determination of the suit herein there be stay of attachment and sale or auction in execution of the decree in Kitui Chief Magistrate Civil Case No. E149 of 2021.



- iv. That costs of this application be provided for.
3. The application is premised on the following grounds;
 - i. That on 23rd April 2024 M/s Samumu Auctioneers attached the applicant's goods
 - ii. The decree the subject of attachment is issued in Kitui Chief Magistrate's Court Civil Case No. E.149 of 2021
 - iii. The said Chief Magistrate's suit arose out of a road accident that was duly insured by the Respondent herein and the Respondents herein conducted the Defence of the said suit up to the end
 - iv. That there is need for the court to stay the attachment and sale or auction of Applicant's property pending the hearing and determination of this application and the declaratory suit herein.
 - v. There is no prejudice to the parties as the applicant's purpose in bringing this suit is to ensure that the court's decree is settled in full.
 - vi. That unless the attachment and sale of the applicant's goods is stayed, the applicant will suffer substantial loss.
 4. The application is supported by the affidavit of the applicant herein Titus T. Ndaka sworn on 25th April 2024. The deponent avers that on 5th April 2020, his motor vehicle registration number No. KAW 622 U prime mover having trailer No. ZG1835 was involved in an accident which triggered institution of Kitui Magistrate's Civil Case No. E133 of 2021. That at the time of the accident, the suit motor vehicle was insured by the respondents herein and upon institution of the suit, the applicant informed the respondents of the suit and they appointed an advocate to defend the claim. That judgment was entered against the plaintiff on 15th February 2024 but the respondents failed to settle the decretal sum resulting in attachment of the applicant's motor vehicle.
 5. In his submissions through learned counsel Mr. Mutua Mboya, the applicant contends that as an insured he is entitled to seek a declaration that his insurer must settle the claim because under Section 10 of the *Insurance Act*, it is mandatory for the insurer to settle claims arising from an accident where it had provided cover.
 6. He maintains the position that he is only seeking a stay of execution to save his property from attachment and auction by the Interested Party following the respondents' failure to settle the decretal sum. He contends that the Interested Party ought to be involved in these proceedings as he would be affected by any stay orders made by this court. He relies on the case of *Gateway Insurance Co. Ltd v Moses Jaika Luvai* (2008) eKLR where the court held that a party applying to be enjoined in the suit can be allowed under some circumstances.
 7. In addition, the applicant has also cited the case of *Trusted Society of Human Rights v Mumo Matemo & 5 Others* (2014) eKLR where the Law Society of Kenya had sought to be enjoined as an interested party. The Supreme Court declined to have LSK enjoined in the proceedings as it held that it had manifested its partisan support for the 1st respondent in the matter. The Supreme Court found that it was improper for it to be enjoined as an Interested Party or as amicus. In its decision however, the court gave a definition of who an interested person is in proceedings as follows;

“...an Interested Party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the



Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

8. The applicant has also placed reliance on Justice G.V Odunga’s reasoning in the case of *Andrew Linge Mutua v Geminia Insurance Company Limited & Zipporah Mwende Mutua (Interested Party)* (2021) eKLR. where the court issued orders of stay and opined that it was just in the circumstances to preserve the substance of the suit and allow the applicant prosecute his declaratory suit against his insurer. The court however maintained that the primary obligation of settling the decree fell squarely on the Applicant and that in the event the Defendant as his insurer failed to satisfy the decree, the Applicant would still be called upon to satisfy the same.
9. The applicant further submits that unless stay is granted his entire suit will collapse because what he is asking for in the suit is for the insurer to settle the claim by paying the Interested Party.
10. He contends that the 2nd respondent has already paid half decretal sum in Civil Case No. E005/2024. He submits that, while there is nothing that prevents him from paying the decretal sum and going for re-imburement from the respondents, execution in his view will prejudice him and complicate matters.
11. He faults the Interested Party contending that the decision in *Geoffrey Gichomo Mwangi v Xplic Insurance Co. Ltd* [2021] eKLR is quoted out of context adding that the applicant in that case was also seeking a stay of proceedings which in his view is a more weighty relief or remedy as compared to a stay of execution.
12. The Interested Party has opposed the application vide a Replying Affidavit sworn by counsel Musili Mbiti on 17th May 2024 and a further affidavit sworn on 31st May 2024.
13. The deponent avers that the Interested Party is not privy to the contract between the applicant herein and the respondents. It is also averred that the present declaratory suit between the applicant and the respondents revolves around enforcement of a contract which is different from the suit between the applicant and the Interested Party which stems from a road traffic accident. That there is no relationship between the present suit and execution proceedings commenced by the Interested Party against the applicant. The Interested Party seeks to have his name struck out from this suit stating that he was wrongly enjoined as the Interested Party.
14. He faults the applicant for approaching this court with unclean hands stating that he was issued with cheques which bounced upon presentation for payment.
15. He contends that he was the plaintiff in Kitui CMCC No E149 of 2021 wherein the applicant seeks to stay whereas the cause of action herein is completely different adding that he has been wrongly added in a party here yet he is not privy to the contractual agreement between the applicant and the defendants herein. He has relied on the decision of Seron J in *Geoffrey Gichomo Mwangi v Xplic Insurance Co. Ltd* where the court declined to stay proceedings in similar circumstances adding that a declaratory suit cannot be used to stay proceedings or execution of a decree in another suit.
16. This court has considered this application and the response made by the Interested Party. The plaintiff/ applicant herein is a judgement debtor in the primary suit where the Interested Party is the decree holder. This application was canvassed alongside the applications in Kitui HCC No. E002/2024 & E005/2024. This ruling shall therefore apply to those cited suits as well.
17. The applicant’s contention which is not contested is that the defendants were the insurers of his Motor Vehicle Registration No. KAW 622V prime mover with trailer No. ZG 291835 which was involved in



a fatal road accident. That accident was the subject matter of the primary suits to wit Kitui CMCC No 149/2021, Kitui CMCC No. 133/2021 and Kitui CMCC No. E124/2021 where the Interested Parties Dennis Mutinda, Mwangela Kiminza & Mutunga Mukatya and Lucy Njeri Wachira & Karen Ngina Muthoka were the claimants/plaintiffs respectively. In these matters, the applicant has filed declaratory suits to have the defendants settle the decrees entered against him.

18. The respondents have taken a back seat in this application opting to let the applicant and the Interested Parties square it out.

19. This application has raised two issues basically which are:

- i. Whether the Interested Party is properly enjoined in these proceedings and
- ii. Whether this court should invoke its inherent jurisdiction to stay execution in the primary suits as sought by the applicant.

20. To start with the issue of enjoinder of the Interested Party, it is clear from the pleadings filed that the Interested Party has little or no role to play in the main suit but in this application he stands to be affected by the prayers from stay of execution because the stay sought is related to the primary suit where he is a party and the decree holder.

21. The term ‘Interested Party’ is defined under Rule 2 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules](#), 2013 to mean;

“a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”

22. And in the case of [Trusted Society of Human Rights v Mumo Matemo & 5 Others](#) (2014) eKLR, the Supreme Court described an Interested Party as follows;

Consequently, an Interested Party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.

23. The various Interested Parties are properly enjoined in the suits in my view since they all have an identifiable stake or legal interest in the matters given that the judgments sought to be stayed are in their favour as such the outcome of the declaratory suits will likely determine who will satisfy their decrees.

24.

(b) Whether this court should grant a stay of execution the applicant as observed above has invoked the inherent powers of this court under Section 3A of [Civil Procedure Act](#) and its discretionary under Section 63(e) of [Civil Procedure Act](#).

Section 3A of the [Civil Procedure Act](#) states:

“Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

Section 63(e) of the [Civil Procedure Act](#) states:



Section 63(e)

- (e) make such other interlocutory orders as may appear to the court to be just and convenient.

25. The above sections give this court the power to make such orders as necessary to meet the ends of justice or prevent an abuse of court process. The applicant seems to have opted for the former because he has not faulted the Interested Party for abusing the court process. In his view, the ends of justice will be met by an order of stay of execution.

26. The application is also premised on Order 22 Rule 22 of the Civil Procedure Rules which provides on when a court may order for stay of execution as follows;

“(a) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.

a. Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.

b. Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.”

27. The above provision is not applicable in this case as this is not the court that passed the decree or where the decree has been sent for execution. In the present matter, the applicant is seeking to stay execution in matter that has been heard and determined pending in the determination of lower court pending the declaratory suit herein. The applicant’s suit is premised on the ground that he was insured by the defendants and that they are the ones who ought to settle the decree in the primary suit. The duty of insurer to satisfy judgments against persons insured is provided for under Section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act* as follows;

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”

28. In the Replying Affidavit sworn on 31st May 2024 in E002 of 2024, it is averred that the applicant has come to court with unclean hands as he issued the Interested Party with bounced cheques as settlement of the decree. That issue will be considered later in this ruling.



29. On the question of whether a grant of stay of execution should be granted once an insurer files a declaratory suit, courts have taken varying positions. In the case of *Andrew Linge Mutua v Genmnia Insurance Co. Ltd & Zipporah Mwende Mutua (Interested Party)* (*supra*), Odinga J (as he then was) took the position that an insurer needed a measure of protection through stay to avoid rendering a declaratory suit an academic exercise or assist the insurer in effect to avoid a statutory obligation to compensate victims. He held that the interests of the decree holder are covered in the declaratory suits and therefore faced no prejudice if stay was granted. He was however firm that a defendant had primary obligation to settle Judgments passed against them. He stated;

“I must however state that the primary obligation of settling the decree falls squarely on the Applicant and in the event the Defendant as his insurer fails to satisfy the decree, the Applicant will 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 Applicant from meeting his obligations under the tort of negligence. It must be noted that nothing prevents the Applicant from settling the decretal sum and then suing the Defendant for compensation or reimbursement.”

30. Similarly, in the case of *Florence Waitthera Mwaura v Kenya Orient Insurance Limited; Vegpro Kenya Limited (Interested Party)* [2021] eKLR, the court held that an insured deserved some protection because once the property is seized and auctioned it could not be recovered.

31. In *Geoffrey Gichomo Mwangi v Xplico Insurance Co. Ltd & Another* (*supra*) Serگون J declined to grant a stay of proceedings on grounds that the dispute arose out of an insurance contractual relationship between the plaintiff and the 1st defendant and the 2nd defendant who was the decree holder was not privy to the contract between the insurer and its insured.

32. Now turning to the present case, the applicant as I have observed holds the view that the interest of justice will be served by an order of stay but the Interested Party holds a different view as I have outlined above. This court while it views the decisions in *Andrew Linge Mutua v Genmnia Insurance Co. Ltd & Zipporah Mwende Mutua (Interested Party)* (*supra*) and *Florence Waitthera Mwaura v Kenya Orient Insurance Limited (Supra)* with deference, I am inclined to take the position in *Geoffrey Gichomo Mwangi v Xplico Insurance Co. Ltd & Another* (*supra*) because of the following reasons:

- i. The main dispute in this matter is breach of contract between the defendants/respondents and the plaintiff/applicant. The applicant alleges that there was breach of contractual obligations by the respondents and the cites Section 10(i) of the *Insurance (Motor Vehicles Third Party Risks) Act*. The Interested Party is not privy to the contractual relationship between the plaintiff and the defendants. He is not privy to the terms of the agreement. He is also not at fault in anyway and he has not been faulted by any of the parties in relation with the breach of contract if any between the plaintiff and the defendants.
- ii. Secondly, while the plaintiff is entitled to seek his statutory right under Section 10(i) of the *Insurance Act*, there is nothing that bars an insured person or the decree holder from executing a lawful decree passed in his favour. I am also of the opinion that the suit herein cannot be rendered spent or nugatory if the applicant pays and seeks re-imburement from the insurers or the defendants. Whatever loss he incurred in satisfying the decrees or likely to suffer is quantifiable in monetary terms and can be compensated by commensurate or suitable relief. I am not persuaded that the harm is irreparable. A stay of execution sought will likely cause delay to the Interested Parties in realizing the fruits of their judgments and compensation for the injuries they sustained. So weighing the scales of justice, I do find that the scales tilts in



favour of the Interested Parties because there is no appeal pending in the primary suits and the sum awarded were never challenged or contested in an appeal.

- iii. Thirdly, the applicant, has not tabled sufficient material or evidence to warrant issuance of the orders sought in this application. He is asking this court for a chance to pursue his insurers to facilitate settlement of decrees but he has not tabled a contract or document evidencing the relationship between him and his insurers who were not even parties at the primary suits. He says that half decretal sum has been paid in one of the suits but there is no evidence to back it up. In the absence of a policy document and in the absence of admission by the defendants, it cannot be assured that the defendants (insurers) are obligated under Section 10 of the *Insurance (Motor Vehicle Third Party Risks) Act* to satisfy the decree. In the 2 decisions I have cited above, (*Andrew Linge Mutua v Genmnia Insurance Co. Ltd & Zipporah Mwende Mutua (Interested Party)* (*supra*) and *Florence Waitbera Mwaura v Kenya Orient Insurance Limited* (*Supra*) the policy documents were provided to the court as a prima facie demonstration of a breach of contract by the insurers.
31. The Interested Party has also faulted the applicant on oath for issuing bad cheques. He has not contested that fact and therefore issuing bad cheques and therefore he has come to a court of equity with unclean hands. One cannot ask for an equitable remedy with unclean hands.

In the premises, this court finds no merit in the application dated 25th April 2024. The same is disallowed. Costs will be in the main suit. This ruling is to apply to Kitui HCC Case No. E002 of 2021 & Civil Suit E005 of 2024.

DATED, SIGNED AND DELIVERED AT KITUI THIS 11TH DAY OF JULY, 2024

HON. JUSTICE R. K. LIMO

JUDGE

