



**Waweru v Xplico Insurance Company Limited; Ngeno & 2 others (Interested Parties) (Civil Suit E22 of 2023) [2024] KEHC 9152 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9152 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT E22 OF 2023  
HM NYAGA, J  
JULY 19, 2024**

**BETWEEN**

**JEREMIAH WAWERU ..... PLAINTIFF**

**AND**

**XPLICCO INSURANCE COMPANY LIMITED ..... DEFENDANT**

**AND**

**HENRY KIBET NGENO ..... INTERESTED PARTY**

**GILBERT KIBUNGEI RONO ..... INTERESTED PARTY**

**RAZOR SHARP AUCTIONEERS ..... INTERESTED PARTY**

**RULING**

1. Vide a Notice of Motion dated 14<sup>th</sup> December, 2023 brought under Articles 28, 40 & 48 of *the Constitution* of Kenya, Sections 4, 5 & 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 42 Rule 6(1) & (2) of the Civil Procedure Rules, the Applicant seeks for orders that: -
  1. Spent
  2. Spent
  3. That pending the hearing and determination of this suit, this Honourable Court be and is hereby pleased to grant a temporary order of stay of execution of the joint judgement and decrees dated 31<sup>st</sup> July, 2023 given in Molo Chief Magistrate Civil Suit No. E281 of 2023, Henry Kibet Ng'eno Vs. David Njoroge Ndungu & Jeremiah Waweru and Molo Chief Magistrate Civil Suit No. e 282 of 2023, Gilbert Kibungei Rono V. David Njoroge Ndungu & Jeremiah Waweru.



4. That the Costs of this Application be borne by the Defendant.
2. The Application is premised on the grounds on its face and supported by an affidavit of the Applicant, Jeremiah Waweru sworn on 14<sup>th</sup> December, 2023.
3. He deposed that he is the registered/beneficial owner of Toyota Matatu registration Number KBZ 783 W and that for the period commencing on 10<sup>th</sup> September,2021 and expiring on 10<sup>th</sup> October,2021, he took out a Motor Vehicle Policy number XP10000258417 of Insurance in respect of third party risks with the Defendant for the said Matatu.
4. That on or about 17<sup>th</sup> September, 2021, his Motor Vehicle was involved in a Road Traffic Accident with Toyota Allion Registration Number KBY 329 K and as a result the 1<sup>st</sup> and 2<sup>nd</sup> interested parties sued him and his driver in Molo Chief Magistrate Civil Suit No. E281 & E282 of 2022.
5. He averred that once he was served with the pleadings, he notified the Respondent of the same who advised him to pay Ksh. 30,000/= and after he did, it instructed a counsel to defend the suit against him and on 31<sup>st</sup> July, 2023 a joint judgement was entered jointly and severally against him and his driver.
6. He deposed that subsequently the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties obtained warrants of attachment of Movable Property dated 17<sup>th</sup> October, 2023 which were issued to the 3<sup>rd</sup> Interested Party who thereafter served him with the Proclamation Notices which attached the subject Motor Vehicle and his household items.
7. He averred that Under Section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act*, the Respondent must satisfy any sum payable thereunder in respect of the liability but it has refused/neglected to satisfy the same even after demand letters were issued to it.
8. He contended that the said Matatu was his only source of income and therefore it is imperative that the Respondent, be compelled to satisfy the said decrees lest he be left homeless and destitute if compelled to satisfy the same.
9. It was his averment that the total money due and owing is Ksh. 499,904/= which money continues to attract interest until payment in full, and unless this court stays the execution of the said decree, he will lose his movable properties and suffer substantial loss despite having diligently insured himself against such risks as required under the Laws of Kenya.
10. The Application is unopposed and it was argued through written submissions. Only the Plaintiff/Applicant filed his submissions.
11. It is important to note that the interested parties filed a notice of preliminary objection to the entire suit in which they argued that;
  - a. The suit herein is incompetent as no leave was sought before the commencement of the suit against the defendant as required by law.
  - b. The interested parties are not privy to the contract of insurance between the plaintiff and defendant hence cannot derive any benefits or objections from the same.
  - c. That the suit is oppressive in that it is seeking to deny the interested parties the fruits of their judgment in the suit in the trial court.
  - d. That a fresh suit Cannot be filed and Stay a lawful judgment/decree which has not been challenged.



## **Applicant's Submissions**

12. The Applicant framed three issues for determination. Namely;
  1. Whether the suit can be maintained against the defendant which is under Receivership/insolvency, without first obtaining leave of the court.
  2. Whether a fresh suit can be filed to stay a lawful decree of a court which has not been challenged.
  3. Whether the Plaintiff should be granted the orders sought.
13. On the first issue, the Applicant submitted in the negative for grounds that pursuant to Section 67 C of the *Insurance Act*, the Respondent is neither under receivership nor insolvent and under Section 523 it is not under Administration since no administrator has been appointed.
14. With respect to the second issue, the Applicant submitted that under Section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act*, the respondent has a duty to satisfy any sum payable but it failed to honour its obligation hence the reason he filed this fresh suit to compel it to meet its statutory and contractual duty.
15. The Applicant posited that if stay of execution is not granted pending hearing and determination of this suit, this suit, as framed will be rendered an academic exercise since the 1<sup>st</sup> and 2<sup>nd</sup> interested parties have initiated the execution process. To this end, reliance was placed on the case of *Ndonye v Invesco Assurance Co. Ltd (Civil Suit 23 of 2021)* [2022] KEHC 416 (KLR) (5 May 2022) (Ruling).
16. The Applicant further argued that to allow the Respondent to avoid compensating the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties in view of the aforesaid Section 10 of the Act would be rendering the Act impotent and the court would be assisting the Respondent to avoid its contractual obligations. To buttress this position, the Applicant relied on the case of *Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & another* [2014] eKLR.
17. With regard to the last issue, the Applicant citing the case of *Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & another* (supra) submitted that they have an arguable case with a probability of success against the Respondent as he has demonstrated that he took an insurance policy with the Respondent yet the Respondent has failed to meet its obligation.
18. The Applicant thus urged this court to allow the Application as prayed.

## **Issues for Determination**

19. The issue that arises for determination is whether this court should grant stay of execution of judgement in Molo CMCC Nos. E281 & 282 all of 2023.

## **Analysis & Determination**

20. In the instant case, it is uncontroverted that the Applicant took out an insurance policy with the Respondent under Policy Number XP10000258417 for his Motor Vehicle Registration No. KBZ 783 W. The Applicant annexed a copy of the Certificate of Insurance which shows that the respondent as his insurer. It is undisputed that the Applicant is a Judgement debtor and guided by the above persuasive precedent I am of the view that the Respondent under Section 10 of the aforesaid Act has a statutory obligation to pay the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties who are judgement creditors decretal sum in respect of the liability that arose from by use of the insured motor vehicle on the road unless the liability thereof has been avoided in accordance with the law.



21. The Applicant seeks to compel the respondent herein to fulfill its contractual and statutory duty of settling the decretal sum Pursuant to Section 10 (1) of the Insurance Motor Vehicle Third Party Risks Act.

22. Section 10 (1) of the said Act provides 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.”

23. As seen from the cases cited by the applicant, there has been a lot of litigation over the issue now before this Court.

24. 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.

25. For instance, in *Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & Another*(supra) 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.”

26. 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.”

27. 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.”

28. In the case of *Joseph Mwangi Gitundu vs Gateway Insurance Co. Ltd* [2015] eKLR, Gikonyo J. considered the duty of indemnity placed on the insurer under section 10 (1) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405 Laws of Kenya and observed as follows:

“Therefore, under section 10(1) of Cap 405 Laws of Kenya, the insurer has a statutory obligation to 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. The obligation is statutory and a strict one; it cannot be shifted or abrogated by a term in the contract of insurance or in the manner proposed by the Defendant, lest the noble intention of the Act to guarantee compensation of third parties who suffer injuries arising from by use of the insured motor vehicle on the road should be lost. Similarly, if the statutory obligation placed by law on the insurer was to be shifted to the insured as proposed by the Defendant, the purpose for taking out an insurance policy and the compulsion by the Act for such insurance cover to be taken out on vehicles to be used on the roads to cover third party risks under Cap 405 Laws of Kenya will also be defeated.”

29. However, in my opinion, that statutory right of action does not bar a decree holder from executing the decree issued in his favour against the insured directly. To buttress this point, I will cite two decisions.

30. In *Kassam Hauliers Limited vs Mezgebu Gatachew Mammo* [2022] eKLR the court further held that;

“Given the facts of this case, I take the view 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. Therefore, the Respondent in this case is not barred by the declaratory suit from executing against the Appellant directly.”

31. In *Dolk Limited vs Invesco Assurance Company Limited & 5 Others* [2018] eKLR Odunga, J. (as he then was) similarly held that;

“... 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.”



32. In *Jane Wanjiru Mwangi Vs. Xplico Insurance Co. Ltd. & Another* (2021) eKLR 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.

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.

33. In *Stephen Amollo Odhiambo Vs Monarch Insurance* (2022) KEHC 15610 (KLR) it was held that:

- a. “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.
- b. 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.”

34. 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 1<sup>st</sup> 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 2<sup>nd</sup> respondent was ill conceived. He is not privy to the contract between the applicant and the 1<sup>st</sup> 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 2<sup>nd</sup> respondent has no foundation in law."

35. As I have indicated in the case above, the primary duty of settling the decree falls squarely on the Applicant. In the event the 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.
36. In my opinion, the Interested Parties are not privy to the contract between the applicant and the Respondent, who has conveniently failed to file any response. The matter is between the applicant and its insurer, with no reference to the interested party.
37. 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 the insured party and any third parties laying claim for compensation.
38. If such application is to be allowed, then no judgment and decree involving an insured vehicle will ever be executed.
39. The Act cannot be interpreted to curtail the rights of successful parties holding lawful decrees from realizing the fruits of their judgments.
40. Given the foregoing, I am also not satisfied that the applicant has established sufficient cause to justify the exercise of this court's discretion in granting the orders sought.
41. It is thus my finding that the application lacks merit and it is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 19<sup>TH</sup> DAY OF JULY, 2024.**

**H. M. NYAGA**

**JUDGE**

In the presence of;

C/A Jeniffer

Mr. Koigi for Plaintiff

No appearance for plaintiff

No appearance for Interested party

