



**Rono v Monarch Insurance Co. Ltd; Livia (Interested Party) (Civil Suit E011 of 2023) [2024] KEHC 10850 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10850 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT E011 OF 2023  
JRA WANANDA, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**LUCY CHEMELI RONO ..... PLAINTIFF**

**AND**

**THE MONARCH INSURANCE CO. LTD ..... DEFENDANT**

**AND**

**JOY LIVIA ..... INTERESTED PARTY**

**RULING**

1. The Plaintiff, through Messrs Kogo Kimutai & Co. Advocates, filed this suit on 14/07/2023 seeking a declaration that the Defendant, an Insurance company (and the Plaintiff's insurer), is obligated by law to settle the Judgment entered against the Plaintiff in favour of the Interested Party and arising out of a road accident.
2. Together with the Plaint and the other usual Pleadings accompanying it, the Plaintiff also filed the Notice of Motion the subject of this Ruling, dated 14/07/2023. The prayers sought in the Application are as follows:
  - i. [.....] Spent
  - ii. [.....] Spent
  - iii. That this Honourable Court be pleased to order a stay of execution of the judgment and decree in Eldoret CMCC No. E269 of 2020, Joy Livia versus Lucy Chemeli Rono, pending the hearing and determination of this suit,
  - iv. Costs of this Application be provided for.



3. The Application is expressed to be brought under various provisions of the Civil Procedure Rules, including Order 22 Rule 22, Sections 3A of the *Civil Procedure Act* and Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap. 405. The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by the Plaintiff, Lucy Chemeli Rono.
4. In the Affidavit, the Plaintiff deponed that on 1/12/2020 her motor vehicle registration number KBZ 287X was involved in a road accident, that on 10/07/2023, he learnt that a suit had been instituted against him by the Interested Party, and that he was never served with the pleadings save for the warrants of attachment, decree and proclamation notice that were served upon her on 10/07/2023 by the Auctioneer. She deponed further that upon her Advocates perusing the Court file, they learnt that the Interested Party had obtained judgment against her in the said suit and which judgment was delivered on 30/03/2023, and that by virtue of the judgment, the Interested Party has now instructed Auctioneers to attach and sell the Plaintiff's property. She contended further that sufficient cause exists to warrant issuance of the orders of stay of execution since the Defendant has failed, ignored and/or declined to pay the decretal amount to the Interested Party. According to her therefore, it would be a miscarriage of justice for the ex parte judgment to stand, that the Application has been brought without inordinate delay and that she is ready and willing to abide by all reasonable terms and conditions that this Court may deem fit.

#### **Interested Party's Response**

5. In opposing the Application, the Interested Party, through Messrs Mwinamo Lugonzo & Co. Advocates, filed a Replying Affidavit on 13/02/2024. In the Affidavit, she deponed that she was the Plaintiff in the parent suit, Eldoret CMCC No. E269 of 2020, and argued that staying execution of the judgment in the parent suit will adversely affect her as it will deny her from enjoying the fruits of the Judgment. She contended that the issues between the Plaintiff and its insurer (Defendant) should not affect her as she is not a necessary party to this suit and is a stranger hereto. According to her, the Plaintiff ought to settle the decretal sum and thereafter seek to be indemnified by the Defendant, that the execution is lawful and legal, and that the Court has delivered its Judgment in the parent suit and is now functus officio. She deponed further that the Court cannot issue an order of stay of execution on the basis of the suit herein, that the Application has been brought under wrong and incorrect provisions of the law, that no useful purpose will be gained in staying the Judgment and that the Affidavit in support to the Application is incompetent and offends the mandatory provisions of the *Oaths and Statutory Declarations Act* and the Civil Procedure Rules.

#### **Defendant's Grounds of Opposition**

6. The Defendant, on its part, through Messrs Omondi Otieno & Associates Advocates, filed Grounds of Opposition on 6/11/2023. It argued that the Application is an abuse of the Court process intended to create a legal morass, elevate costs unnecessarily and waste precious judicial time and that it does not meet the threshold for the grant of the orders sought. It was also averred that the Application is contrived subterfuge aimed at curing an incompetent suit since the alleged warrant of attachment against the Applicant's property obtained by the interested party is not attached.

#### **Hearing of the Application**

7. The Application was canvassed by way of written Submissions. The Defendant's Counsel, Mr. Otieno, however informed the Court that he will be relying on the Grounds of Opposition and would not therefore file any written Submissions. Pursuant thereto, the Plaintiff filed his Submissions on 24/10/2023 while the Defendant filed on 3/11/2023.



## Plaintiff's Submissions

8. Counsel for the Plaintiff submitted that Courts have found that the applicable principle in cases of stay pending hearing and determination of a declaratory suit is similar to one for stay pending appeal where one needs to satisfy the Court that the suit in existence is an arguable one with high chances of success. He cited the case of Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & another [2014] eKLR. He submitted that based on the facts deponed in the Affidavits, the Plaintiff has proved a prima facie case based on the provisions of the Insurance Motor Vehicle (Third Party Risks) Act Cap 405 and cited the case of Isaack Wakoli v Xplico Insurance Company [2021] eKLR. Counsel argued further that from the above decisions, it is clear that the insurer is mandated to respect the provisions of the law, to avoid a situation where such provisions may not serve their intended purpose. He also cited the case of Escolgne Properties Ltd-Vs-I.R. Commissioners (15) [1958] A.C at 565.
9. Counsel further submitted that in this case, it is not in dispute that the Plaintiff insured the motor vehicle with the Defendant and that at the time of the accident the insurance policy was still valid. He cited the case of Xplico Insurance Company Limited vs. Mary Nthambi Mutua [2019] eKLR, where the Court cited the decision of the Court of Appeal in the case of Justus Mutiga & 2 Others vs. Law Society of Kenya & Another [2018] eKLR. He argued further that the Plaintiff has shown a sufficient cause and has also demonstrated that there existed a valid insurance policy and that is the reason why the Defendant had instructed Advocates to defend its interests in the primary suit.
10. Counsel then submitted that although it has been held that the principle applicable in such case is similar that of to stay pending appeal, cases of stay pending hearing and determination of the declaratory suit are distinguishable with that of stay pending appeal when it comes to the issue of providing security. He argued that this is because the sole purpose of filing the suit is because the Plaintiff is unable to satisfy the judgment itself hence the Defendant is the one who ought to do so. Counsel urged the Court to consider the circumstances of the case and grant stay on condition that the hearing of the suit is expedited. He cited the case of Charles Makenzi Wambua v Africa Merchant Assurance Co. Ltd & another [2014] eKLR, the case of Alois Ochieng' Ndege v Explico Insurance Company Limited; Jane Wachuka Munene (Interested Party) [2022] eKLR and the also case of Njeru Patrick v Invesco Assurance Company Limited; Granton Ukonde Mulala (Interested Party) [2021] eKLR.
11. In conclusion, Counsel urged the Court to consider the reasoning in the said case of Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd (supra) where the Court stated that if stay is not granted, then the Court will be assisting the Defendant to avoid a contract whose terms are dictated by statute, to compensate the interested parties.

## Interested Party's Submissions

12. Counsel for the Interested Party submitted that as regards grant of stay of execution of a decree as governed by Order 22 Rule 22 of the Civil Procedure Rules, the Courts have held that the applicable principles are similar to those for stay pending Appeal. He submitted further that the Plaintiff has not satisfied the applicable conditions and has not demonstrated what substantial loss she will suffer if stay is not granted as it is not enough to put forward mere assertions of substantial loss without any evidence in support. He cited the case of Kassam Hauliers Limited V Mezgebu Gatachew Mammo [2022] eKLR.
13. He contended that the Interested Party has a right to enforce her judgment and allowing the Application will only delay execution, that the Plaintiff's intention is to hinder the Interested Party from enjoying the fruits of his judgment, and that the Plaintiff can still make the payments to the



Interested Party and then pursue a refund from the Defendant directly. He argued further that the Interested Party was never privy to the contract between the Plaintiff and its insurer (Defendant) and cited the case of *Kassam Hauliers Limited v Mezgebu Gatachew Mammo* (supra). On security for the decree, Counsel cited the case of *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another* [2018] eKLR and submitted that the Plaintiff has not offered to make any provision for security for the due performance of the decree yet the law is clear that such is a mandatory requirement for grant of orders of stay.

## Determination

14. The issue that arises for determination herein is “whether an order of stay of execution should be issued staying execution of the Judgment obtained by the Interested party against the insured, pending the hearing and determination of the insured’s declaratory suit herein against the insurer”.
15. What the Plaintiff seeks is to stay execution of the Decree issued in the primary suit pending the determination of this suit. Order 22 Rule 22 of the Civil Procedure Rules upon which the Application is predicated provides as follows:

“Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.”
16. It is not in dispute that the Interested Party holds a valid Decree against the Plaintiff. In this suit, the Plaintiff seeks Judgment that the Defendant be compelled to meet its obligations under the contract of insurance by satisfying the said Decree and that in the meantime, the execution of the Decree be stayed. The Defendant did not file a Replying Affidavit to the instant Application and only filed Grounds of Opposition. I however note that the Defendant, in its Statement of Defence, has denied ever insuring the Plaintiff and averred, in the alternative, that even if it did so insure the Plaintiff, it was never made aware of the accident. It is therefore evident that the order of stay, if granted, will affect the interests of the Interested Party.
17. In cases of this nature, my view is 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 holder of a Judgment against the insured from directly executing the decree issued in his favour against the insured.
18. Back to the instant case, the Plaintiff did not attach any documents to the instant Application to demonstrate that indeed she took out a policy with the Defendant in respect of the motor vehicle. She also did not attach a copy of any communication with the Defendant or Claim Form which she filled to demonstrate that she reported the accident to the Defendant. I however note that together with the Plaintiff, the Plaintiff also filed a List of documents attaching copies of the documents that she intends to rely on at the hearing of the main suit. Although she did not attach a copy of the policy or a certificate of insurance, the copy of the police abstract included therein bears the Policy Number ELD/0200/01049902/1/2020 indicated to have been issued by the Defendant herein, The Monarch Insurance Co. Ltd. The abstract further shows that the said policy commenced on 30/08/2020 and was to expire on 29/07/2021. The accident having been alleged to have occurred on 1/12/2020, if the said Policy is genuine, then the date of the accident would fall squarely within the period that the policy was in place. Needless to state, all these are matters that are still contested and will only be conclusively determined after the trial.



19. Be that as it may, the Plaintiff's cause of action is anchored on the provisions of Section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act* which provides as follows:

“ 10. Duty of insurer to satisfy judgments against persons insured

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.”

20. If the Plaintiff was truly insured by the Defendant and if she did report the accident to the Defendant, then, from a reading of the said provision, it would appear that the Plaintiff has a genuine cause for complaint, for the said provision gives her a definite cause of action against the insurer. I am therefore persuaded that the Plaintiff has demonstrated, on a prima facie basis, that there exists a right which may have been infringed by the Defendant as to call for a rebuttal from the latter. It is unfortunate that the Interested Party, a holder of a lawful Judgment finds herself caught up in the tussle between the Plaintiff and the Defendant yet she is not even privy to the insurance contract between those two.
21. However, the Plaintiff has demonstrated that its property is on the verge of being sold in execution of the primary Court's decree and yet there are issues to be determined between it and the Defendant and which issues touch directly on the obligation to settle the Decree the subject of this suit. I am persuaded that unless a measure of protection is given, the Plaintiff stands to suffer irreparably should her attached property be sold in execution. On this aspect, I agree with the position taken by Hon. Omondi, J. (as she then was) in *Apollo Ogunda vs. Africa Merchant Assurance Co. Ltd & 4 Others* in which she found as follows:

“The tragedy and prejudice is that, were this suit against the Respondents to succeed, and were this Court to find that the Respondent has no basis for repudiating the contract, then I don't think the Applicant would even have a way of recovering the property which will already have been sold to satisfy the judgment on CMCC No. 666 of 2011.”

22. I must however restate that the primary obligation of settling the decree falls squarely on the Plaintiff and in the event that the Defendant, as the insurer, fails to satisfy the decree, the Plaintiff may still be lawfully 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 Plaintiff from meeting her obligations under the tort of negligence. It must also be noted that nothing prevents the Plaintiff from settling the decretal sum and then suing the Defendant for compensation, indemnification or reimbursement. Indeed, there are several authorities to this effect. In the circumstances, even if the Plaintiff were to succeed against the Defendant at the trial, the Plaintiff may still have an uphill task at the trial to convince the Court to permanently bar the Interested Party from pursuing the Plaintiff for payment of the Decree. I trust that the Plaintiff's legal team is well prepared for that assignment.
23. In the end, this Court finds that under the above circumstances, justice would be done to the parties if an order of stay of execution of the decree in the primary suit is issued. I agree that grant of an order of stay may inconvenience the Interested Party as it will delay her enjoyment of the fruits of her Judgment. Hopefully, such delay will only be for a short time. Declining to grant the stay will mean that the



- Plaintiff will risk suffering immense prejudice should her attached property be sold in execution in respect of a peril for which she may have truly taken out an insurance cover with the Defendant. In light of the foregoing, I am satisfied that the instant Application is meritorious and I will therefore grant it.
24. However, since the Interested Party has a lawful Judgment in her favour and is being kept away from enjoying the fruits of such Judgment, I believe that it is only fair that a balance be made between the interests of the Plaintiff and the interests of the Interested Party. In the circumstances, I find it only fair that the Plaintiff should deposit some security for performance should this suit not succeed. I am not persuaded by the Plaintiff's counter-argument that she should not be ordered to deposit security simply because it is the Defendant who has the obligation to settle the Decree. That obligation has not yet even been determined.
25. I note that the Warrants of Attachment exhibited and dated 6/07/2023 indicates that the decretal sum as at that date was Kshs 416,739/-. To be fair to both sides, as a condition for grant of the orders of stay, I will fix a condition that the Plaintiff deposits an amount of Kshs 100,000/- as security and also settles the Auctioneer's fees for conducting the proclamation.
26. I may mention that even as I grant the stay of execution, there are various High Court authorities restating the already stated view that an applicant such as herein is not seeking judgment against the interested party but against its insurer (Defendant), that there is no judgment which the insurer has obtained against the applicant which is sought to be stayed, 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 a decree issued in his favour against the insured directly. For this reason, various Courts have declined to entertain such claims and/or to grant stay of execution. I have in mind authorities such as the following:
- i. Jenipher Anyango Oloo v Buzeki Enterprises Limited & Another [2021] eKLR, (Aburili J),
  - ii. Dolk Limited v Invesco Assurance Company Limited & 5 Others [2018] eKLR, Odunga J (as he then was).
  - iii. Muthuri Ntara & Another v Francis Mworira Igweta [2016] eKLR (Gikonyo J).
  - iv. In the matter of Blue Shield Limited (Under Statutory Management) 2017 eKLR (L. Njuguna J).
  - v. In the Matter of Concord Insurance Company (2014) eKLR (Gikonyo J)
  - vi. George Ngure Kariuki Vs. Charles Osoro Makone & Another (2014) eKLR (L. Njuguna J)
  - vii. Jane Wanjiru Mwangi v Explico Insurance Company Limited: Duncan Odhiambo Owino (Interested Party/Respondent [2021] eKLR (Mboghli-Msagha J).
  - viii. 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 (Odunga J, as he then was)
  - ix. James Ng'ang'a Njenga V Commissioner of Insurance & 3 Others [2011] eKLR, in (W. Karanja J).
  - x. Kensilver Express Ltd & 3 Others V Commissioner of Insurance & 4 others [2007] eKLR (Angawa J).
27. The above decisions are however not binding on this Court, being decisions of Courts of equal jurisdiction, although quite forceful and persuasive. In the circumstances, rather than shut out the



Plaintiff at this early stage, I will grant the Plaintiff her day in Court so as to give her an opportunity to persuade or convince this Court to depart from the said authorities and to rule otherwise. As aforesaid, I trust that the Plaintiff's legal team is well forewarned of the enormous task at hand.

### **Final Orders**

28. In the premises, I order as follows:

- i. The Plaintiff's Notice of Motion dated 14/07/2023 is hereby allowed in terms of prayer 3 thereof.
- ii. Accordingly, an order of stay of execution of the Judgment and/or Decree issued in Eldoret CMCC No. E269 of 2020, including stay of the Warrants of Attachment issued to Messrs Razor Sharp Auctioneers, is hereby granted pending the hearing and determination of this suit.
- iii. As a condition for the orders of stay of execution granted in (i) and (ii) above, the Plaintiff shall, within a period of 45 days, deposit a sum of Kshs 100,000/ in an interest earning bank account to be opened in the joint names of the Advocates on record for the Plaintiff and for the Interested Party, respectively, in a bank to be agreed upon. In default, the orders of stay shall lapse and the Interested Party shall be at liberty to proceed with execution.
- iv. The Plaintiff shall also settle the said Auctioneers' fees or charges for the proclamation effected and whose quantum shall be discussed and agreed upon by the parties and if no agreement is reached, then such quantum shall be taxed by the lower Court in the ordinary manner.
- v. To fast track the hearing and determination of this suit, and considering the nature thereof, the parties to consider doing away with the necessity of viva voce taking of evidence and consider, instead, canvassing the suit by way of documents only.
- vi. The costs of the Application shall be in the Cause.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2024**

**WANANDA J. R. ANURO**

**JUDGE**

Delivered in the presence of:

N/A for Plaintiff

Brian Otieno for Defendant

Mategwa for Mwinamo for Interested Party

Court Assistant: Brian Kimathi

