



REPUBLIC OF KENYA



**Maiyo v Kiptum & another (Civil Suit E008 of 2024)  
[2024] KEHC 12991 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12991 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL SUIT E008 OF 2024  
RN NYAKUNDI, J  
OCTOBER 25, 2024**

**BETWEEN**

**PHILEMON KIPKEMBOI MAIYO ..... PLAINTIFF**

**AND**

**ELIAS KIPTUM ..... 1<sup>ST</sup> DEFENDANT**

**INVESCO ASSUARANCE COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. What is pending before me for determination is a Notice of Motion Application dated 16<sup>th</sup> July 2024 premised upon Section 1A, 3A, Order 51 Rule 1, Section 5b of *Insurance Third Party Motor Vehicle Risks*, Article 50 and 169 of the *Constitution* where the Applicant is seeking the following orders:
  - a. Spent.
  - b. That pending the hearing and determination of this application interpartes there be stay of execution and/or sale of motor vehicle registration no. KBF 867W Toyota Matatu.
  - c. That pending the hearing and determination of this application interpartes motor vehicle KBF 867W Toyota Matatu be released to the Applicant.
  - d. That pending the hearing and determination of Eldoret High Court Civil Suit no E008 of 2024, motor vehicle registration no. KBF 867W be released to the Applicant unconditionally.
  - e. That pending the hearing and determination of Eldoret High Court Civil Suit no E008 of 2024, the 1<sup>st</sup> Respondent be compelled to refund Kshs. 100,000/= obtained from the Applicant in part settlement of the decretal sum.
2. The Application is based on the grounds on the face of it among others:



- a. The Applicant is the registered owner of motor vehicle registration no KBF 867W Toyota Matatu.
  - b. That on 16/12/2022 the said motor vehicle was involved in an accident within Eldoret Town.
  - c. That at the time of the accident, the Applicant had a valid Motor Vehicle Third Party Risks Insurance Cover with the 2<sup>nd</sup> Respondent.
  - d. That as a result of the accident, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent sustained injuries and they filed small claims Civil Suit no. 235 of 2023 and 232 of 2023 when judgement was entered in their favour and where the Applicant was ordered to pay a joint sum of Kshs. 547,400/=.
  - e. That the Applicant contends at time of the accident, he had a valid insurance cover which covered his motor vehicle from such claims.
  - f. That to realize the judgement the 1<sup>st</sup> Respondent has instructed Hegeons Auctioneers who have attached his motor vehicle and intend to sell it on 17/7/2024.
  - g. That the Applicant's contention is that the 1<sup>st</sup> Respondent should seek to realize their judgement from the 3<sup>rd</sup> Respondent not himself.
  - h. That the 1<sup>st</sup> Respondent has not demonstrated whether they have attempted to realize their judgement from the 2<sup>nd</sup> Respondent.
  - i. That the 1<sup>st</sup> Respondent has not demonstrated whether the 2<sup>nd</sup> Respondent is incapable of satisfying the respective judgements.
  - j. That the Applicant therefore pray for stay of execution and/or sale of motor vehicle registration no KBF 867W Toyota Matatu and further stay of execution pending the hearing and determination of Eldoret High Court Civil Suit.
  - k. That pending the hearing and determination of this application interpartes, the court be pleased to issue an order to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent agents/auctioneers Hegeons Auctioneers to release motor vehicle registration no KBF 867W Toyota unconditionally.
  - l. That pending the hearing and determination of High Court Civil Suit no, the court be pleased to issue an order to the 1<sup>st</sup> Respondent agents/auctioneers Hegeons Auctioneers to release motor vehicle registration no KBF 867W Toyota unconditionally.
3. The Application is supported by the annexed affidavit dated 16<sup>th</sup> July 2024 sworn by Philemon Kipkemboi Maiyo, the Applicant herein where he avers as follows:
- a. That I am the registered owner of motor vehicle registration no KBF 867W Toyota Matatu.
  - b. That on 16/12/2022 the said motor vehicle was involved in an accident within Eldoret Town where the 1<sup>st</sup> Respondent suffered injuries.
  - c. That at the time of the accident, I had a valid Motor Vehicle Third Party Risks Insurance Cover with the 2<sup>nd</sup> Respondent.
  - d. That as a result of the accident, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent sustained injuries and where they filed small claims Civil Suit no. 235 of 2023 and 232 of 2023 when judgement was entered in their favour and where I was ordered to pay a joint sum of Kshs. 547,400/=.



- e. That I contend at time of the accident, I had a valid insurance cover which covered his motor vehicle from such claims.
- f. That to realize the judgement the 1<sup>st</sup> Respondent has instructed Hegeons Auctioneers who have attached my motor vehicle and intend to sell it on 17/7/2024.
- g. That my contention is that the 1<sup>st</sup> Respondent should seek to realize their judgement from the 3<sup>rd</sup> Respondent not himself.
- h. That the 1<sup>st</sup> Respondent has not demonstrated whether they have attempted to realize their judgement from the 2<sup>nd</sup> Respondent not myself.
- i. That the 1<sup>st</sup> Respondent has not demonstrated whether the 2<sup>nd</sup> Respondent is incapable of satisfying the respective judgements.
- j. That when judgement was delivered, the matter proceeded ex parte and due to lack of legal advice, I paid Kshs. 100,000/= as part settlement of the decretal sum.
- k. That out of legal advice from my Advocate on record, I am now informed that my insurance Invesco Assurance is obligated to settle the claims from the 1<sup>st</sup> respondent.
- l. That I therefore pray for stay of execution and/or sale of motor vehicle registration no KBF 867W Toyota Matatu and further stay of execution pending the hearing and determination of Eldoret High Court Civil Suit No. E008/2024.
- m. That pending the hearing and determination of this application interpartes, the court be pleased to issue an order to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent agents/auctioneers Hegeons Auctioneers to release motor vehicle registration no KBF 867W Toyota unconditionally.
- n. That pending the hearing and determination of High Court Civil Suit no, the court be pleased to issue an order to the 1<sup>st</sup> Respondent agents/auctioneers Hegeons Auctioneers to release motor vehicle registration no KBF 867W Toyota unconditionally as the same is my source of income.
- o. That this application is brought without undue delay.
- p. That it is in the interest of justice that this application be granted to allow parties canvass the issues raised in High Court Civil Suit No E008/2024.

#### **Analysis and Determination**

4. I have considered the application, the affidavit in support and the response by the Respondents. The bone of contention is the process of execution and enforcement of judgments arising out of Small Claims Civil Suits No. 235 of 2023 and 232 of 2023 in which judgment was entered in favor of the Plaintiff to pay a sum of Kshs. 547,400/=. The applicant Plaintiff asserts that at the time of the accident, he had a valid insurance cover for motor vehicle registration KBF 867W Toyota Matatu which policy in essence was to take care of the insured risks of such claims as adjudicated before the small claims



court. That to realize the judgments, the 1<sup>st</sup> Respondent has instructed Hegeons Auctioneers to attach the aforesaid motor vehicle to realize the decretal sum.

5. The Law on grant of orders under Order 42 Rule 6 of the *Civil Procedure Rules* is wide and prospective, which fall within two major limbs. First and foremost, is stay of execution for an aggrieved party to file an appeal against judgment or ruling of a trial court. Second, is an order for stay of proceedings to pave way for an appeals or review court to determine certain matters which have arisen at the interlocutory stage before final judgment in that other forum.
6. As for our case, the Plaintiff is aggrieved that the 2<sup>nd</sup> Respondent, Invesco Assurance Co. Ltd is not coming through to honor its obligations under Section 5 and 10 of the Insurance third party motor vehicle risks necessitating the judgment creditor to pursue the enforcement of the decree by way of attachment of his motor vehicle Reg. No. KBF 867W Toyota Matatu. I am of the considered view that the Plaintiff has invoked the jurisdiction of this court by way of filing a declaratory suit for an interpretation of the policy of insurance in respect of the subject motor vehicle. This vehicle apparently has been attached by Hegeon Auctioneers under instructions by the 1<sup>st</sup> Respondent.
7. In matters of this nature the law is settled as founded in the case of *Chris Munga Bichage versus Richard Nyagaka Tong'i & 2 others* (2013) eKLR and *Stanley Kangethe Kinyanjui versus Tony Keter & 5 other* (2013) eKLR. In considering whether the intended suit shall be rendered nugatory if stay of execution of the judgment of the Small claims court is not granted, this court relies in the proposition in the Kangethe Kinyanjui case (supra) in which the court stated that the term nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. Whether or not an appeal or suit would be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is irreversible or if it is not reversible whether the damages would compensate the party aggrieved. The other argument canvassed by the Plaintiff/Applicant is the aspect of having an insurance policy stated to cover the risks against accident claims with regard to motor vehicle KBF 867W and in the event it is sold, the proceeds might not satisfy the judgment debt and yet he has no further income generating sources to compensate the claimants. It has also been argued by the Plaintiff/Applicant that since he has a valid insurance policy with the 2<sup>nd</sup> Respondent, a need has not arisen for him to satisfy the decretal sum personally.
8. In summation, applying the provisions of Order 42 Rule 6(1) of the *Civil Procedure Rules* and the principles in the above authorities, there are high chances that if the execution process against the Plaintiff/applicant is not stayed, the declaratory suit will be rendered nugatory. As the decided cases suggest, I exercise discretion in the circumstances of this case to grant stay of execution of the decree arising out of Small Claims Court No. 232 and 235 of 2023 pending the hearing and determination of the suit. The alleged motor vehicle KBF 867W be kept in safe custody at the auctioneer's yard pending the outcome of the suit. In the alternative, the Plaintiff/Applicant be at liberty to provide an undertaking for the payment of the decretal sum in the form of a bank guarantee as a condition to have his motor vehicle released so as to continue realizing the economic rights which accrue from the public transport services offered by the aforesaid motor vehicle.
9. The costs of the application to abide the outcome of the suit

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 25<sup>TH</sup> DAY OF OCTOBER 2024**

.....  
**R. NYAKUNDI**

**JUDGE**

