



Kibargoi Agencies Limited v Resolution Insurance Co. Limited; Langat & 2 others (Interested Parties) (Civil Suit E011 of 2022) [2023] KEHC 537 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEHC 537 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT E011 OF 2022
TM MATHEKA, J
FEBRUARY 2, 2023**

BETWEEN

KIBARGOI AGENCIES LIMITED APPLICANT

AND

RESOLUTION INSURANCE CO. LIMITED RESPONDENT

AND

BETTY LANGAT INTERESTED PARTY

PRECIOUS CHEROP INTERESTED PARTY

GLADYS CHEBET INTERESTED PARTY

RULING

1. At all material times the applicant was the registered owner of the Motor Vehicle Registration number KAV 247 M/ZC 0854. It claims that it entered into a commercial insurance policy with the Respondent vide policy number P000035417TPO in respect of the said Motor Vehicle.
2. On 23rd May, 2020 that motor vehicle was involved in a road accident with Motor Vehicle Registration Number KAZ 964 C wherein the interested parties herein sustained injuries. The filed suits seeking compensation for special and general damages in MOLO CMCC NO.E004 OF 2020, NO.E005 OF 2020 & NO.E003 respectively.
3. It is the Applicant's position that immediately after the accident it informed the Respondent who appointed an advocate to defend the said claims. The matter ended in favour of the interested parties vide a decree issued on 14th March, 2022. the interested parties commenced execution proceedings by serving it with proclamation notices and warrants of attachment and sale on the ground that the period granted to settle the decretal sum had since expired.



4. The Applicant blames the Respondent for not updating it on the progress of the case and the subsequent judgement and stated that it became aware of the same upon being served with the decree.
5. On 6th April, 2022, it filed Notice of Motion under Section 1A, 1B, 3 & 3A of the [Civil Procedure Act](#), Order 22 Rule 22 and Order 50 Rule 6 of the [Civil Procedure Rules 2010](#), seeking inter alia that: -
 1. Spent
 2. Pending the hearing and determination of this Application, there be a stay of execution of the decrees in MOLO CMCC NOS. E004, E005 and E003 all of 2020.
 3. The warrants of attachment and sale issued in MOLO CMCC NOS. E004, E005 and E003 all of 2020 and proclamation over the Applicant's assets be lifted.
 4. Costs for this Application be provided for.
6. The grounds for the application are stated on the face of the application and its Affidavit sworn on 4th April, 2022 by John Kosgey who is its director.
7. It is the Applicant's contention that if execution is not stayed the suit herein will be rendered nugatory and stands to suffer substantial loss as its business activities are likely to be crippled yet it is the Respondent's obligation to settle the claim arising from the aforementioned accident.
8. The 1st interested party Betty Langat opposed the application vide replying affidavit sworn on 21st April, 2022.
9. She deposed that the primary suit has not been challenged by way of an appeal or review by the plaintiff and that there is no provision in law for the application before court.
10. She averred that she is not privy to the insurance contract between the applicant and the respondent thus not supposed to be affected by it as she is not bound by the terms of the said contract and that the cause of action in this suit does not involve her.
11. She stated that she will be prejudiced if this court grants the orders sought as the suit between the applicant and the respondent did not relate to execution in the primary suit.
12. She averred that applicant is entitled to the declaration that the respondent is bound to settle the claims under the insurance policy. However the statutory right does not bar her from executing a lawful decree against the Applicant directly.
13. She averred that applicant is not barred by any law from settling the decretal amount then seek compensation from the respondent.
14. She contended that the application is brought in bad faith since the applicant is aware that the respondent has been placed under statutory management thus in the event a declaration is made she will be adversely affected by the orders since the decretal amount will still be unsettled.
15. It was her position that applicant is guilty of filing multiplicity of applications which are only meant to deny her the fruits of the judgment and that the orders sought herein are redundant since the applicant has commenced satisfying the decree in the lower court particularly in regards to the 3rd interested party thus a clear indication that the applicant has ability to settle her decretal amount.
16. She averred that the suit is time barred since the action for declaration has lapsed such time being limited to three months after commencement of the proceedings in the primary suit.



17. She asserts that this application has been brought as a delaying tactic since the judgement was delivered on 29.11.2021 but the applicant waited until execution process was commenced to file myriad of application.
18. She stated that in the event the stay of execution is granted, the applicant be ordered to provide security for the decretal amount or deposit the entire decretal amount in court.
19. The 2nd interested party Precious Cherop also opposed this application through her replying affidavit sworn on 21st April 2022. She echoed the entire averments contained in the 1st interested party's affidavit of 21.4.2022.
20. The 3rd interested party also swore an affidavit on 21.04.2022 in opposition to this application. She deposed that this application is incompetent, a waste of court's time and an abuse of the court process and should be dismissed.
21. She deponed that the orders sought herein are redundant as the applicant has satisfied the decretal amount in her matter MOLO CMCC E003 OF 2020.
22. The Applicant swore a further affidavit in response to the interested parties' replying affidavits on 14th May 2022.
23. He averred that the Principle of privity of contract has been relaxed or excepted under the modern statutory law. That having paid premiums for the accident motor vehicle, the applicant had a legitimate expectation that the respondent would step in and perform its statutory obligations by settling the claims that arose from the said accident which was within the period insured.
24. He reiterated that the interested parties will not suffer any prejudice that cannot be made good through award of costs as compensation as it is decree upon a liquidated sum.
25. He contended that at the time of filing the main suit and the instant application, the applicant's directors were not aware that the defendant/respondent herein had been placed under statutory management and that in any event there are mechanisms in law that ensure that the decretal sums in respective claims are settled by the statutory manager.
26. He averred that the Applicant made payment under duress as the auctioneers acting at the behest of the 3rd respondent threatened to carry off the applicants tools of trade and that the monies used were actual bank overdrafts to the applicant which are yet to be settled.
27. He deposed that main suit herein is not time barred since a declaratory suit as this one can only be made once the risk has materialized in the form of a money decree.
28. He contended that the applicant is willing to abide by any reasonable and fair conditions set down by this Honorable court as security.
29. The respondent despite due service never filed any response to the Application.
30. The Parties disposed off the Application via written submissions.

SUBMISSIONS

The Applicant's Submissions

31. The Applicant filed its submissions on 22nd July, 2022.



32. The Applicant submitted that they have established a prima facie case with high chances of success as he has demonstrated that it took out an insurance policy with the respondent and as such the respondent is bound to settle the decretal sum, that it is willing to deposit half of the decretal amount in the primary suit in court as security, he has filed the application timeously and that no prejudice is likely to be occasioned to the interested parties that cannot be compensated by award of damages. He thus submitted that it has met the conditions set out in *Giella v Cassman Brown & Co.Ltd* [1973] EA358.
33. It was submitted that the respondent was statutorily obligated to settle the 1st and 2nd interested parties claims under section 10 of the *Insurance (Motor Vehicle Third Party Risks)* Cap 405. Reliance was placed on *Joseph Mwangi Gitundu v Gateway Insurance Co. Ltd* [2015] eKLR where the court held that the insurance company has statutory obligation to pay judgment of the third parties unless the liability thereof has been avoided in accordance with the law and specifically section 10 of Cap 405.
34. The applicant submitted that the prayers sought are capable of being granted as they seek to compel the respondent to perform its statutory obligations.
35. The applicant argued that the Principle of Privity of contract has been relaxed under Modern law. For this proposition he referred to the case of *Joseph Mwangi Gitundu v Gateway Insurance Co.Ltd* [2015] eKLR where the court stated:-

“.. I should state that, the principle of privity of contract has been relaxed under modern statutory law, implied warranty and strict liability cases. Cap 405 of the laws of Kenya is one such law and has provided for a statutory exception to the rule on privity of contract. Third parties for whose benefit the insured takes out a policy of insurance are the direct beneficiaries of the policy of insurance even if they are not parties in the contract of insurance. The duty of insurer to satisfy judgments against persons insured is provided for under section 10(1) of Cap 405 Laws of Kenya...”

36. The applicant also relied on the decision by Mwongo J in *Great Rift Shuttle Services Limited v African Merchant Assurance Co Ltd; Felix Opwora Oduor & 4 others (Interested Parties)* [2018] eKLR where the judge cited with approval the case of *Frederick Gathungu Nganga v African Merchant Assurance Co Ltd and Another* Nakuru HCCC No 65 of 2015 which supports the grant of stay of execution sought herein.
37. It thus submitted that pursuant to section 63(e) of the *Civil Procedure Act* this court has wide discretion to grant the orders sought.

INTERESTED PARTIES SUBMISSIONS

38. The interested parties filed their submissions on 4th June 2022.
39. They reiterated the averments contained in their replying affidavits.
40. It was their positions that the provisions of order 22 Rule 22 of the *civil procedure rules 2010* are inapplicable in this case for reason that this court neither issued the decree nor was the decree sent to it for execution. They relied on the case of *Osugo Paul Makombi v Britam General Insurance Co. (K) Ltd; Samwel Ondieki Momanyi (Intended Interested Party)* [2021] eKLR where the court stated that the under order 22 rule 22 it is plainly stated that application for stay can be sought from the court to which a decree has been sent for execution.
41. The interested parties also submitted that the provisions of order 42 Rule 6 of the *Civil Procedure Rules 2010* and section 79 of the *Civil Procedure Act* are inapplicable as the applicant neither preferred an



appeal on the primary judgement nor review. To support this position, the interested parties relied on *Kassam Hauliers Limited v Mezgebu Gatachew Mammo* [2022] eKLR.

42. The interested parties argued that there is no cause of action against them in the instant case as the applicant is seeking stay of execution in a separate suit with different parties. They referred to *Kenneth Kang'ethe T/A Savanah Investments V Blue Shield Insurance Co. Ltd.* [2010] eKLR where the court held that a court cannot issue stay judgment through another suit which is not an appeal.
43. The interested parties submitted that they are not privy to the contract between the applicant and its insurer. They relied on *Aineah Liluyani Njirah v Agha Khan Health Services* [2013] eKLR, *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* [1985] eKLR, *Agnes Chepus v Margaret Goko* [2020] eKLR where the courts observed that only parties to a contract are privy to it and that even if a third party is mentioned he is not privy to the contract and cannot enforce it.
44. The interested parties further submitted that the applicant bears the primary responsibility to satisfy the judgment and that the issues between the applicant and the defendant should not bar the interested parties from executing a lawful decree of the lower court. They relied on *Jane Wanjiru Mwangi v Xplico Insurance Company Limited; Duncan Odhiambo Owino(Interested Party/Respondent)* [2021] eKLR which support this position.
45. On who bears the burden of settling the decretal amount when an insurance company is placed under statutory management, the interested parties argued that this is not provided for under the Act. However, the question was well answered in the case of *Mercy Waitthera v United Insurance Company Statutory Manager & 3 Others* [2019] where the court categorically stated that the insured has the responsibility of settling the claims by 3rd parties in the event its insurer became insolvent so long as there is a valid decree.

ISSUES FOR DETERMINATION

46. The only issues that arise for determination are: -
 1. Whether this court should grant stay of execution of judgement, decree and any further proceedings in MOLO CMCC NOS. E004, E005 and E003 all of 2020.
 2. Whether the warrants of attachment and sale issued in MOLO CMCC NOS. E004, E005 and E003 all of 2020 and proclamation over the Applicant's assets should be lifted.

ANALYSIS & DETERMINATION

47. In the instant case, no appeal has been lodged and thus the above law provision is inapplicable. Further the persuasive case of *Kassam Hauliers Limited v Mezgebu Gatachew Mammo* [2022] eKLR supports this position. In this case the court stated as follows: -

“.... The Appellant/ Applicant has also expressly stated that it does not wish to appeal against that Judgment but intends to pursue an application for grant of stay of execution of the Judgment pending the determination of the declaratory suit. In that connection, the provisions of Order 42 Rule 6 of the Civil Procedure rules which apply to an application for stay of execution of a decree subject of an appeal is inapplicable in relation to the Judgment entered on 16th January, 2020”

48. It is undisputed that the Applicant is the Judgment debtor in the aforementioned primary suits while the interested parties are the decree holders. There is also no dispute that the respondent was the insurer of the Applicant's suit Motor Vehicle at the time of the accident. The applicant seeks to compel the



respondent herein to fulfil its contractual and statutory duty of settling the decretal sum Pursuant to Section 10 (1) of the *Insurance Motor Vehicle Third Party Risks) Act*. This section provides that:-

“(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.”

49. In view of the above, it is patent the Respondent has a statutory obligation to pay the judgment of the third parties unless the liability thereof has been avoided in accordance with the law.
50. However, 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. In *Dolk Limited v Invesco Assurance Company Limited & 5 Others* [2018] eKLR and that of *Muthuri Ntara & Another v Francis Mworio Igweta* [2016] eKLR the court stated that despite the fact that section 10 (1) of the *Insurance (Motor Vehicle Third Party Risks) Act* providing for the mandatory satisfaction of a judgment of any sum payable to its insured under a policy, the section does not provide for a stay of execution against the insured by the third party and further that the statutory right to seek a declaration against the insurer by the insured does not and cannot bar a decree holder from executing his/her decree against the judgment debtor who is the insured.
51. The primary duty 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. Nothing prevents the Applicant from settling the decretal sum and then suing the Respondent for compensation or reimbursement.
52. There appears to be no dispute that the respondent has been placed under statutory management and granting the orders sought will greatly prejudice the interested parties. In circumstances where the insurer becomes insolvent during the pendency of a valid insurance contract under section 10 of the Act it is the insured that is bound to satisfy the Judgement in favour of the third parties. See *Kenney Jaden Kwaji v Minister for Finance & 3 others* [2005] eKLR where the court held as follows with respect to the liability of the insured where the insurance company had collapsed:

“The contract of insurance is between him (the insured) and the Insurer (the Insurance Company). If the insurance company has collapsed he must carry that risk in a free enterprise system such as ours, the insurer was a company of his choice. If he had insured with a better managed Insurance Company, the risk he took could have been absorbed. He probably insured in good faith, believing that since the insurer was licensed by the state, it was a good bet to insure with. He lost. His only right is to prove the loss or debt (represented by the decree against him) with the statutory manager, receiver or liquidator.

..It is a balancing act. The primary liability in my view is that of the insured. There is a valid decree of court against him or it, and so long as that decree subsists he is liable to satisfy it”

53. Flowing from the above there appears to be no justifiable grounds upon which the order of stay of execution can issue. In any event the applicant has already satisfied the judgment of the third interested party arising from the same cause of action. The Applicant’s contention that it satisfied the same under



duress is unsubstantiated and not backed by any evidence. Further the applicant has not demonstrated it is financially constrained and or incapable of settling the decretal sum

54. Hence the warrants of attachment and sale issued in Molo CMCC Nos. E004, E005 and E003 all of 2020 and proclamation over the Applicant's assets are regular and legal and there are no grounds for lifting the same.
55. In the circumstances I find that the prayers sought are not tenable. The application is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 2ND DAY OF FEBRUARY 2023.

Mumbua T Matheka

Judge

C/A Jennifer

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