



**Syuma & another (Suing as administrators of the Estate of Gabriel Siakora Kisabuli (Dcd))
v Chikati (Civil Appeal 65 of 2019) [2023] KEHC 2290 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2290 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL 65 OF 2019
DK KEMEL, J
MARCH 20, 2023**

BETWEEN

IMMACULATE SIAKORA KISABULI 1ST RESPONDENT

DAVID KISABULI SYUMA 2ND RESPONDENT

**SUING AS ADMINISTRATORS OF THE ESTATE OF GABRIEL SIAKORA
KISABULI (DCD)**

AND

PETER WAFULA CHIKATI APPLICANT

RULING

1. By a notice of motion dated August 18, 2022, the applicant herein seeks stay of execution of the decree issued in Bungoma High Court Civil Appeal No 65 of 2019 and all consequential orders pending hearing and determination of the declaratory suit Kimilili Principal Magistrate's Court Civil Suit No E158 of 2022 being legal proceedings instituted against Xplico Insurance Company Limited to satisfy the decree and the judgement in the Bungoma High Court Civil Appeal No 65 of 2019.
2. According to the applicant, he is the judgment debtor and was the owner of motor vehicle registration number KAK 191E involved in the accident of July 4, 2017 wherein the respondents suffered loss. Consequently, the respondents instituted Kimilili Principal Magistrate's Court Civil Case Number 132 of 2017. At the time of the said accident, the subject motor vehicle had a valid insurance policy with Xplico Insurance Company Limited wherein the applicant was issued with a third-party private car motor vehicle insurance policy number 070/034810/2014/2/080 whose commencing date was February 9, 2016 and expiring date was February 8, 2017 in which he paid all premiums.
3. The applicant averred that the suit in the Kimilili Principal Magistrate's Court Civil Case Number E158 of 2022 shall be rendered nugatory in the likely event that the same succeeds if the stay is not granted herein and that the same will occasion him irreparable loss.



4. Opposing the application, the respondents filed a replying affidavit dated August 30, 2022, averring that the decree complained of is for a liquidated sum of money thus the applicant will suffer no irreparable damage.
5. It was averred that if the applicant's declaratory suit against Xplico Insurance Company Limited succeeds, then the applicant would be reimbursed the amount of the money that he would have paid in satisfaction of the decree herein.
6. It was averred that the respondents are bound to suffer great prejudice and loss if the orders for stay of execution are made owing to the fact they are not a party to the declaratory suit. Counsel urged this court to find this application devoid of merit and that the same be dismissed with costs.
7. In response to the respondents replying affidavit, the applicant filed a further supporting affidavit dated September 21, 2022, averring that the law does not bar the respondents herein from being enjoined as interested parties in the Kimilili Principal Magistrate's Court Civil Case Number E158 of 2022 which was already at an advanced stage as interlocutory judgement had already been entered, notice of entry of judgement was already filed, and an affidavit of service was also filed. He further averred that the respondents are beneficiaries to the efforts he is making.
8. The application was canvassed by way of written submissions. Both parties filed and exchanged their respective submissions.
9. On his part, the applicant submitted that it was for the interest of justice and fair play that the stay of execution in this circumstance be granted to enable the applicant to secure the requisite compensation to pay the respondents. He relied on the case of High Court Civil Suit No E009 of 2021, *Njeru Patrick v Invesco Assurance Co Ltd and Granton Ukonde Mulala*.
10. The respondents submitted that the applicant will not suffer any prejudice if he satisfies the decree herein as he will be fully reimbursed the amount to be paid by his insurance settlement and that the respondents should be allowed to enjoy the fruits of their successful litigation. It was further submitted that, in the case of High Court Civil Suit No E009 of 2021, *Njeru Patrick v Invesco Assurance Co Ltd and Granton Ukonde Mulala* as cited by the applicant, the respondent in this matter was enjoined as an interested party and that GV Odunga Judge (as he was then) granted stay subject to provision of security within 30 days stay orders were to automatically lapse. Counsel urged this Court to dismiss the application with costs.
11. It is apparent that the order sought is that of a stay of execution pending the suit pursuant to order 42, rule 6(2) of the *Civil Procedure Rules* which sets out the conditions to be met when it comes to an application for a stay of execution as follows:
 - a) The application must be brought without unreasonable delay;
 - b) The applicant must demonstrate that substantial loss may result; and
 - c) Provision should be made for security.
12. I will begin with the first condition on whether the application has been timeously filed. Upon my perusal of the record, I note that the impugned judgment was delivered on July 23, 2022 following which the applicant filed a declaratory suit which, according to him, was on the advanced stage as the interlocutory judgement had already been entered, notice of entry of judgement was already filed, and an affidavit of service was also filed. He proceeded to file the instant application on August 18, 2022. The instant motion was filed 25 days later. In my view, it is obvious that there has been no delay by the applicant.



13. This brings me to the second condition of substantial loss. On his part, the applicant states and submits that unless the order for a stay of execution is granted, the respondents will move to recover the judgment sum from him and yet he is of the view that it is the Xplico Insurance Company Limited; being his insurer; who ought to settle the claim brought by the respondents herein in the primary suit.
14. The respondents on their part are of the view that the applicant is intent on hindering them from enjoying the fruits of their judgment and yet he can still make payment and pursue a refund from the insurer.
15. The relevance of substantial loss in any application for a stay of execution was aptly addressed in the Court of Appeal case, namely *Kenya Shell Limited v Benjamin Karuga Kibiru & Ruth Wairimu Karuga* (1982-1988) 1 KAR 1018 thus:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”
16. Further to the above, the legal position is that substantial loss strictly entails that which has to be prevented by maintaining the status quo of the parties involved, otherwise the appeal will be rendered nugatory.
17. Upon considering the rival positions above, I am of the view that in the circumstances of this application, the applicant 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 respondents who already have a judgment in their favor of which they are entitled to enjoy the fruits, it is imperative for the hearing and prosecution of the declaratory suit to be expedited, if that is the case.
18. On the third condition, the respondents were of the view that the applicant has not offered to make any provision for security for the due performance of the decree or for security for costs. The applicant did not offer a response to the above sentiments, subject to the allegation that the declaratory suit was at the interlocutory judgement stage.
19. The law is clear that the provision of security for the due performance of the decree is a mandatory requirement in the granting of an order for a stay of execution.
20. Be that as it may, section 10(1) of the *Insurance Motor Vehicle (3rd Parties Risks) Act* cap 405, (the Act) provides that where the owner of motor vehicle has taken out a policy of insurance which purports to indemnify him and other authorized persons in respect of liability to third parties intended to be protected under Section 5(b) of the *Act* for injuries or death to them in the use of the Motor Vehicle on the road; and
 - A. a judgment in respect of liability as is required to be covered is obtained against such owner of motor vehicle (the insured);
 - B. Then, notwithstanding that the insurer may in accordance with the terms of the insurance contract be entitled to avoid or may even have avoided the policy or liability (under Section 8), or would have restricted or limited the liability as per the terms of the policy (under section 16);
 - C. Nevertheless, the insurer is under mandatory statutory liability first to pay the full judgment sum to the persons entitled to the benefits of the judgment (the injured or estate of the deceased); and



- D. Thereafter, the insurer may recover the due sum so paid to the third party under a clause in the terms of the insurance contract, if any under the Act (as per the proviso to Section 8) or a statutory obligation or liability created against the insured under the Act (as per provision to Section 10).

It is noted that the applicant vide his supporting and further affidavit, did not allude to proving security for the due performance of the decree which may be binding upon him. This was a serious omission on his part since the said condition is mandatory under order 42 rule 6(2) of the Civil Procedure Rules. The applicant seemed to bank on his claim that the respondents should understand that he is pursuing his insure for the compensation which will in turn be turned over to the respondents. This might a naïve way of thinking by the applicant. However, that notwithstanding, I find that an order that the applicant furnishes security in the form of depositing the decretal sums into a joint interest earning account in the names of the parties or their advocates pending determination of the declaratory suit would be the appropriate thing to do so as to take care of the parties concerns.

21. In the end therefore, the application dated August 18, 2022 is hereby allowed in the following terms:
- A. There shall be an order stay of execution of the judgment delivered on July 23, 2022 in Bungoma High Court Civil Appeal No 65 of 2019 on condition that the applicant deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties or their advocates within forty five (45) days from the date hereof failing which the order for stay shall automatically lapse.
- B. Costs of the application to abide the outcome of the declaratory suit.

22 It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF MARCH 2023

D. KEMEI

JUDGE

In the presence of:

Tawai for Appellants/respondents

Peter Wafula Chikati for respondent/applicant

Mr Kizito - Court Assistant

