



Kiragu v Kenyan Alliance Insurance Co. Ltd; Kangethe & 4 others (Interested Parties) (Civil Suit E013 of 2022) [2023] KEHC 3328 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3328 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT E013 OF 2022
RN NYAKUNDI, J
APRIL 20, 2023**

BETWEEN

SAMWEL KIRUTHU KIRAGU PLAINTIFF

AND

KENYAN ALLIANCE INSURANCE CO. LTD DEFENDANT

AND

JOSEPH KARIUKI KANGETHE INTERESTED PARTY

MERCY CHEPKORIR STARAM INTERESTED PARTY

NELSON MAKORI MOSE INTERESTED PARTY

JOSEPH KAMAU NDUNGU INTERESTED PARTY

FELEX ONDERI ONGERI INTERESTED PARTY

RULING

1. By a Notice of Motion dated October 4, 2022, Samwel Kiruthu Kiragu, the Plaintiff/Applicant seeks the following orders: -
 1. Spent.
 2. An order of temporary stay of execution do issue exparte in the interim and or further execution against the judgment/decree in Eldoret CMCC Nos 562,563,564,565,566 and 567 all of 2020 between the Interested Parties and the Plaintiff/Applicant and all consequential orders and or/ proceedings arising therefrom pending the hearing and determination of the application inter-parties.
 3. That warrants of attachment and scale of movable property issued by Eshikhoni Auctioneers in execution of the decrees in Eldoret CMCC Nos 562,563,564,565,566 and 567 all of 2020



between the interested parties V the Plaintiff /Applicant and all consequential orders and or/ proceedings arising therefrom pending the hearing and determination of the declaratory suit.

4. That cost of this application be provided for.
2. The application is premised on the grounds therein and it is further supported by the affidavit deponed by Samwel Kiruthu Kirgau, on October 4, 2022.

The Plaintiff's /Applicant's Case

3. The Applicant deposed that he is the owner of motor vehicle registration number KBR 4777M which had a valid insurance policy with the Defendant herein being policy number MPIEL/POL/148446. That on or about July 2, 2020 the suit motor vehicle was involved in a road accident in which the interested parties herein sustained bodily injuries.
4. The Applicant maintains that at the time of the accident the suit motor vehicle had a valid insurance cover with the Defendant vide policy number MPIEL/POL/148446, which was a comprehensive cover and was supposed to also cover third party risks.
5. The Applicant further deposed that in light of the said accident, the third parties therein instituted different suits for the recovery of damages as result of the injuries that they had sustained as a result of the said accident against him. This being Eldoret Civil Suit Nos 563, 563, 564, 565, 566 and 567 all of 2020. That upon being served with the Summons, the Applicant immediately contacted the Defendant who then appointed an Advocate to defend him against the said suits.
6. Consequently, judgment was entered in favour of the said interested parties against the Applicant in the sum of Kshs 2,023,314/= which amount continues to attract interest together with auctioneers' costs.
7. The Applicant contends that the insurance had assured him that they would pay but have delayed in doing so and now he has been served with proclamation notices and warrants of attachment. That the Defendant has since refused or neglected and or delayed to settled the decretal sum and thus exposing the Applicant to imminent risk of execution, this in total breach of the insurance contract that had been executed between him and the Defendant.
8. The Applicant contends that the Defendant as the insurer at the time when the cause of action arose is duty bound to pay the aforementioned amounts to the various decree holders. The Applicant maintains that the Defendant/Respondent needs to indemnify him in view of there being a valid insurance policy with it.
9. The Applicant further deposed that he has since instituted a declaratory suit against the Respondent to compel it to liquidate the sum of Kshs 2,023,314/= being the decretal sum together with the costs plus any incidental costs that might have arisen.

The Defendant's/ Respondent's Case

10. The Defendant /Respondent opposed the application vide Grounds of Opposition dated October 4, 2022. In a nutshell, the Respondent deposed that this instant application is unmeritorious, lacking substance, incompetent, fatally defective and abuse of Court process. That the orders sought are incapable of being granted on the basis of the grounds set out therein. That Plaintiff breached the material terms of the Insurance Policy Terms and Conditions. Lastly, that the cause of action in the primary suits are not risks covered under the Insurance Policy by the Defendant/Respondent



The Interested Parties' Case

12. In response to the application, the Interested parties filed a Replying Affidavit sworn by Joseph Kariuki Kangethe, dated November 7, 2022, together with a Notice of Preliminary Objection dated November 11, 2022.
13. The gist of the Interested parties' case is that this instant application has been filed in bad taste and is an afterthought as there is inordinate delay in filing it. That its sole purpose is to derail them from enjoying the fruits of their judgment. The Interested parties maintain that the dispute between the Plaintiff and Defendant should be dealt with in another forum wherein they are parties as they are not privity of contract to that effect.
14. The Interested parties contend that in the trial Court, judgment was entered against the Applicant herein and not any other party and that the said decision has never been stayed nor an appeal preferred against it.
15. The Interested parties maintain that this instant application has since been overtaken by events as execution has already commenced.
16. According to the Interested parties no prejudice will befall the Plaintiff and the Defendant if this matter continues to be derailed in Court.
17. The Interested parties further deposed that the applicant is incompetent as it suffers parties' non-joinder and misjoinder, does not disclose any cause of action against the interested parties, is full perjury and is not supported by competent, legal, procedural, facts and grounds to warrant the issuance of the orders sought.
18. The Interested parties contend that the estate continues to suffer at the expense of the Applicant who continues to vex the Court with an unwarranted and flimsy application.
19. In the Notice of Preliminary Objection dated November 11, 2022, the Interested parties raise the following grounds: -
 1. That the application and the suit against the Interested parties herein is a non-starter as it discloses no cause of action against the interested party nor any nexus.
 2. That the suit herein has been brought and /or is presented improperly, fatally defective, grossly incompetent, redundant, incurable and an abuse of the Court process.
 3. That suit suffer parties' non-joinders and misjoinders since the Interested parties herein have no privity of the contract between the Plaintiff/Applicant and the Defendant/Respondent.
 4. That the application is neither supported by a competent legal not procedural facts and grounds as it ought to before the face of equity and the laws of Kenya.
 5. That the proceedings herein and reliefs sought by the Applicant against the Interested parties herein are incapable of being sustained and should be struck out with costs.

Determination

20. Before I delve into the merits or otherwise of this application, I will first address the Interested parties' Notice of preliminary objection dated November 11, 2022.



21. The law as to Preliminary Objections is well settled. In the celebrated case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors* the Eastern Court of Appeal held at page 701 that: -

A Preliminary Objection is in the nature of what used to be a demurrer. It raised a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

22. At page 700 the court had stated that: -

“..... So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded at which by clear implication out of the pleadings and which if argued as a preliminary point may dispose off the suit.” (Emphasis supplied)

23. Ojwang, J (as he then was) expressed himself as follows in *Oraro v Mbaja* [2005] 1 KLR 141: -

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract-giving rise to the suit to refer the dispute to arbitration.... A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion....The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from information, which stands to be tested by normal rules of evidence.”

24. I have keenly looked at the grounds set out by the Respondent and find that, although the same touch on the competence of the application, they would require calling in of evidence and thus the same are not pure points of law but facts. Therefore, the preliminary objection has no merit and thus fails.

25. I will now address the issue of stay of execution.

26. Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:

- (1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.



- (2) No order for stay of execution shall be made under subrule (1) unless –
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
27. In the persuasive decision, the court in the case of *Loice Khachendi Onyango v Alex Inyangi & another* [2017] eKLR held that;
- The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the *Civil Procedure Rules*. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant...”
28. As to whether the applicant shall suffer substantial loss, in the case of *Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga* (1982-1988) KAR 1018 the Court of Appeal pronounced itself to the effect that:
- It is usually a good rule to see if Order 41 Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
29. Similarly, in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR wherein it was held that;
- “The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”
30. The aforesaid cited case further brought out the argument that;
- No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process.”
31. In the present case, the Applicant has not demonstrated the substantial loss, he is likely to suffer if stay of execution orders are not granted. It is noteworthy to mention that the fact that execution has commenced is not reason enough to grant stay of execution. The Court must always be keen enough to balance that act between a successful party and a party who wishes to pursue an appeal. In the instant case, the Applicant has not preferred an appeal against the said decisions but has commenced another suit.
32. I note that the decrees whose stay of execution is sought are monetary decrees. The Applicant herein has not told the Court if he willing to provide security for due performance of the decrees. The Applicant



has rather remained silent on the issue. In Bungoma High Court Misc Application No 42 of 2011 - *James Wangalwa & another v Agnes Naliaka Cheseto* that:

The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail.”

33. On whether the application has been filed without unreasonable delay, the judgment in Eldoret CMCC No 562 of 2020 was delivered on July 1, 2022, whereas the judgments in Eldoret CMCC Nos 563, 564, 565, 566 & 567 of 2020 were all delivered on July 5, 2022, respectively. The application herein was filed on October 4, 2022, the delay is of about (2) months. The Applicant has not rendered any concrete explanation for the said delay. It is my finding thus that this application has not been timeously filed.
34. Flowing from the above, it without a doubt that the Applicant has failed to satisfy the three cornerstone pillars to warrant the grant of stay of execution as provided for under Order 42 Rule (6) of the *Civil Procedure Rules*.
35. In the end, I find that the application dated October 4, 2022 is without merit and the same is dismissed with costs to the respondent.
36. It so ordered.

DATED AND DELIVERED AT ELDORET THIS 20TH DAY OF APRIL, 2023.

R.NYAKUNDI

JUDGE

