



REPUBLIC OF KENYA



**KENYA LAW**  
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**Jemutai v African Merchant Assurance Co.Ltd; Kitanui & another (Interested Parties)  
(Civil Case E006 of 2020) [2023] KEHC 18873 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18873 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL CASE E006 OF 2020  
RN NYAKUNDI, J  
JUNE 15, 2023**

**BETWEEN**

**SHEILA JEMUTAI ..... PLAINTIFF**

**AND**

**AFRICAN MERCHANT ASSURANCE CO.LTD ..... DEFENDANT**

**AND**

**ALFRED KITANUI ..... INTERESTED PARTY**

**ESHIKHONI AUCTIONERS ..... INTERESTED PARTY**

**RULING**

1. By notice of motion dated November 13, 2020 the plaintiff/applicant seeks orders that;
  - 1 Spent.
  2. There be stay restraining Eshikhoni Auctioneers from attaching and or seizing the Applicant's motor vehicles registration numbers KCN 673R and KCT 014Z pending the hearing and determination of this application inter partes.
  3. There be stay of execution of the decree issued in Kapsabet PMCC No47 of 2019 pending the hearing and determination of this application inter partes.
  4. There be stay of execution of the decree in Kapsabet PMCC No47 of 2019 and all its consequential orders pending the hearing and determination of the Declaratory suit filed herewith.
  5. The Defendant/Respondent be condemned to do pay costs of this application.



2. The application is premised on the grounds therein and it is further supported by the affidavit sworn by Sheila Jemutai on November 13, 2020.

### **The applicant's case**

3. The Applicant deposed that she is the registered owner of two motor vehicles registered as KCN 673R and KCT 014Z. The Applicant further deposed that she had taken out a comprehensive insurance cover for the motor vehicle registration number KCN 673 with the Respondent vide policy number AMF/070/1/110677/2018. That on or about December 25, 2018 during the pendency of the said insurance policy motor vehicle registration number KCN 693 was involved in accident with the 1<sup>st</sup> Interested party wherein the 1<sup>st</sup> Interested party sustained injuries.
4. The Applicant maintains that in view of the accident, she approached the Defendant/Respondent regarding the issue and was it informed by the Respondent that it would pay the 1<sup>st</sup> Interested Party.
5. The Applicant further deposed that she was surprised when her brother informed her on October 6, 2020 that M/s Eshikhoni Auctioneers had issued him with letters of proclamation of attachment in view of the decree that was issued vide Kapsabet PMCC No47 of 2019.
6. The Applicant consequently sought for stay of execution as the Respondent negotiated with the interested parties herein. The Applicant maintains that the stay orders have since been vacated and the auctioneers herein have been threatening to impound her motor vehicles. The Applicant further deposed that the only reason that the auctioneers have not yet impounded her vehicles is because she lent them out to a friend and are currently not under her possession.
7. According to the Applicant, she is indemnified by the Respondent by virtue of Section 10 of the [Insurance \(Motor Vehicles Third Party Risks\) Act](#) Cap 405 Laws of Kenya by dint of having a valid insurance policy with them as ay the time of the accident on December 25, 2018.
8. The Applicant is apprehensive that unless the orders sought are issued then the auctioneers may offer the suit motor vehicles and or other proclaimed properties for sale to her detriment. Further that she stands to suffer irreparable loss should the orders sought are not granted.

### **The 1<sup>st</sup> interested party's case**

9. The application is opposed by the 1<sup>st</sup> Interested Party vide the Notice of Preliminary Objection dated December 8, 2020 and his Replying Affidavit sworn on the same date.
10. The Applicant's Notice of Preliminary Objection is solely anchored on Order 9 Rule 9 of the [Civil Procedure Rules](#).
11. According to the Applicant this instant application is only meant to derail this matter and deny him the fruits of his judgement. The 1<sup>st</sup> Interested parties maintains that the application herein lacks substratum as the Applicant has not demonstrated any reasonable cause to warrant grant of stay of execution orders. The 1<sup>st</sup> Respondent further contends that the application herein is an after thought since it has been brought after an inordinate delay whose sole purpose is to defeat, frustrate and abuse the course of justice and the Court process.
12. The 1<sup>st</sup> Interested Party contends that the stay herein if grant must be conditional in order to protect his interests. The 1<sup>st</sup> Interested Party wants the Applicant to deposit the entire decretal sum, interest and costs in Court and further to deposit the suit motor vehicle's logbook in Court.



13. The 1<sup>st</sup> Interested Party further contends that the Applicant's Advocate on record is not properly on record.
14. The application was canvassed vide written submissions. The 1<sup>st</sup> Interested Party filed his submissions dated March 24, 2020 on March 25, 2023 whereas the rest of the parties did not file any.

### **Determination**

15. Before I delve into the merits or otherwise of this application, I will first address the Interested parties' Notice of Preliminary objection dated December 8, 2020.
16. The law as to Preliminary Objections is well settled. In the celebrated case of *Mukisa Biscuits Manufacturing Company Ltd -vs- 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.”

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)

Ojwang, J (as he then was) expressed himself as follows in *Oraro vs. 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. .... ..”

Order 9, rule 9 of the Civil Procedure Rules provides as follows;

When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—

- (a) upon an application with notice to all the parties; or



- (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

Order 9, rule 10 provides;

An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”

17. In the present case the 1<sup>st</sup> Interested Party’s Counsel on record contends that the Applicant’s Counsel on record is not properly on record by the wording of Order 9 Rule 9 of the *Civil Procedure Rule, 2010*. The 1<sup>st</sup> Interested Party’s Counsel further argues that the firm of Ibrahim Alubala Advocates has further not sought for leave of Court to represent the Applicant and that there is no consent between the outgoing and the incoming Advocates herein.
18. However, while appreciating the input of Order 9 Rule 9 of the *Civil Procedure Rules, 2010*, the 1<sup>st</sup> Interested Party’s Counsel has not tendered any evidence to show and or indicate who the Plaintiff’s/ Applicant’s Counsel was in the suit at the trial Court. Unfortunately, from the pleadings on record I cannot tell who was the Applicant’s Counsel at the trial Court as the said proceedings have not been tendered before this Court.
19. While the foregoing in mind the Notice of Preliminary Objection herein cannot therefore stand because allowing it would require the calling of additional evidence to filling in the missing gaps and thus the same does not meet the prerequisites of a Notice of Preliminary Objection.
20. I have considered the application, the affidavits both in support of and in opposition to the application herein as well as the submissions filed. It is clear that what the Applicant seeks in this application is to stay execution of the decree in the primary suit pending the determination of this suit. The Applicant is apprehensive that she will suffer irreparable loss should the orders herein are not granted. Order 42, Rule 6(2) of the *Civil Procedure Rules, 2010* 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.
21. In view of the circumstances in this case, I am of the view 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 the decree issued in his favour against the insured directly.
22. In the case of *James Wangalwa & Another –vs- Agnes Naliaka Cheseto* [2012] eKLR, the Court held 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. 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 ... the issue of



substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

23. It therefore follows that the assertions by the Plaintiff/Applicant that the process of execution is likely to be put in place or that its properties are likely to be attached is not in itself a basis of granting the orders of stay as sought. In my view, purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. In the present case there is no pending appeal against the judgment in Kapsabet PMCC No 47 of 2019 and thus I see no basis for granting of stay of execution as sought.
24. In this case I find no merit in the application dated November 13, 2020 which I hereby dismiss with costs.

**DELIVERED VIA EMAIL DATED AND SIGNED AT ELDORET ON THIS 15<sup>TH</sup> DAY OF JUNE 2023**

.....

**R. NYAKUNDI**

**JUDGE**

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