



**Nganga v Xplico Assurance & another (Commercial Case E381 of 2022)
[2023] KEHC 20396 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20396 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E381 OF 2022**

A MABEYA, J

JUNE 16, 2023

BETWEEN

GEORGE WANYOIKE NGANGA PLAINTIFF

AND

XPLICO ASSURANCE 1ST DEFENDANT

MAITHYA MBALUKA 2ND DEFENDANT

RULING

1. Before Court are four applications for determination and a preliminary objection. The plaintiff filed three of the applications dated September 30, 2022, October 4, 2022 and November 18, 2022, respectively.
2. The application dated September 30, 2022 was brought under article 50 of the *Constitution*, Section 3A of the *Civil Procedure Act* and Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*.
3. It sought orders that pending the hearing and determination of the man suit, execution of the judgment in MCC E614/2021 by the 2nd defendant and his agents be stayed. The application was supported by the affidavit of George Wanyoike Nganga sworn on September 30, 2022.
4. It was contended that the plaintiff was insured by the defendant having paid all premiums in respect of his motor vehicle KBA 238A, PSV-bus (“the said vehicle”) under policy number XPI/0000193960. The same insured him against liability that may be incurred by him in respect of death, material damage or bodily injury.
5. That on June 23, 2022, the 2nd defendant when on board the said motor vehicle sustained injuries and filed a suit MCC E614/2021. That the plaintiff informed the 1st defendant of the suit and it instructed the firm of Ahmednasir Abdikadir & Co. Advocates to represent him and the 1st defendant. Judgment



- was entered for Kshs 750,657.45 and the 1st defendant became liable to pay the 2nd defendant that amount. That the 1st defendant failed to pay and no notice of repudiating the insurance policy had been issued.
6. The 2nd defendant opposed the application vide grounds of opposition dated November 30, 2022. He contended that the application was anchored on the wrong legal provisions which did not provide for issuance of the orders sought. That no law provided for stay orders in declaratory suits and the decree sought to be stayed was against two parties thus a blanket stay would protect a defendant who had not applied for such orders. That the policy document had not been attached.
 7. The plaintiff's 2nd application was dated October 4, 2022. It was brought under Articles 50 of the Constitution of Kenya, Section 3A of the Civil Procedure Act and Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act.
 8. It similarly sought orders staying execution of the judgment in MCC E614/2021 by the 2nd defendant pending the hearing of the main suit, that the 2nd defendant be cited for contempt of the orders of October 6, 2022 and be committed to civil jail, a declaration that the sale of the motor vehicle was void ab initio, orders that possession of the motor vehicle be surrendered back to the plaintiff, declaration that the 2nd defendant sold the motor vehicle at a loss and be ordered to pay the plaintiff Kshs 900,000/= being the difference between the value of the motor vehicle and the selling price.
 9. The application was supported by the affidavit sworn by the plaintiff on October 4, 2022. He contended that after filing the application dated September 30, 2022, the court granted orders for stay of execution by the 2nd defendant and the plaintiff served the order.
 10. That the 2nd defendant through Hebros Auctioneers forcefully took possession of the motor vehicle on October 18, 2022. That the plaintiff was unsuccessful in getting a hearing date for the application and learnt that the matter was stood over on October 12, 2022. That despite being aware of the order, the 2nd defendant auctioned the motor vehicle on October 20, 2022 for Kshs 600,000/- despite the same being valued at Kshs 1.5 million.
 11. That Makao Capital Limited was in possession of the log book having advanced a loan to the plaintiff and secured it through the log book and its interest and that of the plaintiff superseded any other interest.
 12. The 2nd defendant opposed the application vide his replying affidavit sworn on November 30, 2022. He averred that the application was an abuse of court process as a similar application had been filed in CMCC No E614 of 2021 and orders for stay denied.
 13. That he was never served with the orders of October 6, 2022 and only became aware of them on October 18, 2022 by which time they had lapsed on October 12, 2022. That the plaintiff neither filed an affidavit of service nor attended court on October 12, 2022 for mention as directed and the orders lapsed when the matter was stood over.
 14. That the decree was executed lawfully as the motor vehicle was sold by way of auction. That the auctioneer valued the car which was old and could not have attracted Kshs 1.5 million as alleged. That he was improperly joined to the suit as he was not privy to any purported policy between the plaintiff and 1st defendant neither had the plaintiff sought any orders against the 2nd defendant. That no such policy document had been attached.
 15. The 3rd application by the plaintiff was dated November 18, 2022. It was brought under Article 50 of the Constitution, Section 3A of the Civil Procedure Act and Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act. It sought orders that it be consolidated with the application dated October 4,



- 2022 and sought interim orders pending hearing of the application. Those orders have been spent and included that the 2nd defendant files information regarding the details of the purchase of the motor vehicle, that the 2nd defendant served the purchaser of the motor vehicle with all the applications filed in court, and that the 2nd defendant and the purchaser be ordered to release the motor vehicle to Kasarani Police Station for safe keeping.
16. The application was supported by the plaintiff's affidavit sworn on November 18, 2022. He averred that the orders sought were for the preservation of the suit property as the vehicle was missing from Startuck Limited yard where it was situated. That there was risk of it being sold despite the plaintiff and Makao Capital Limited having an interest in it.
 17. The 2nd defendant opposed the application vide grounds of opposition dated November 30, 2022. It was contended that the application was an abuse of court process as the motor vehicle had already been sold pursuant to the warrants of sale issued in CMCC E614 of 2021 in execution of the decree and the application sought to reverse a legal process.
 18. That the 2nd defendant was not an auctioneer and was not in possession of the information sought including contacts of the purchaser.
 19. The 4th application for determination was filed by the 2nd defendant and was dated November 30, 2022. It was brought under Order 1 rule 10(2) of the [Civil Procedure Rules](#). It sought orders that the 2nd defendant be struck out from the suit.
 20. The application was supported by the 2nd defendant's affidavit sworn on November 30, 2022. He contended that the plaint dated 31/9/2022 sought declaratory orders against the 1st defendant and no prayers were sought against him. That the suit was based on a purported contract/insurance policy of which the 2nd defendant was not privy to and the same had not been produced by the plaintiff. That there was no valid cause of action by the plaintiff against him.
 21. The plaintiff opposed that application vide his replying affidavit sworn on 8/12/2022. He contended that the 2nd defendant was properly joined to the suit and the judgment from this suit would affect the 2nd defendant as it would inform him on the proper party to execute the decree against.
 22. The preliminary objection was raised by the 2nd defendant and was dated November 30, 2022. It was raised against the suit and applications dated September 30, 2022 and October 4, 2022, respectively.
 23. The objection was based on grounds that the decree in which the plaintiff sought declaratory orders was for Kshs 750,657/- which value was within the jurisdiction of the Small-Claims court and/or Chief Magistrates Court. That the application was an omnibus application seeking different reliefs governed by different legal principles and therefore incapable of being properly adjudicated by this Court.
 24. That the stay orders sought in the said application were in the nature of a moratorium under section 67(10) of the [Insurance Act](#) and the orders could only be issued by the 1st defendant's statutory manager appointed by this Court. That the stay order could also not by law extend to apply to the 2nd defendant who was neither a policy holder nor a creditor of the 1st defendant.
 25. That the application was anchored on the wrong legal provisions which did not provide for issuance of the orders sought, and no provision provided for stay orders pending the hearing of a declaratory suit. That the decree in MCC E614 of 2021 was against 2 defendants yet the plaintiff sought a blanket stay which would protect the other defendant from execution despite there been no application for stay by that defendant.



26. The plaintiff filed a supplementary affidavit which he swore on 8/12/2022 in response to the preliminary objection and the various grounds of opposition filed by the 2nd defendant. He contended that the 2nd defendant was aware of the insurance policy between the plaintiff and 1st defendant. That the orders of October 6, 2022 had not lapsed by the time the 2nd defendant was served.
27. That since the repossession of the motor vehicle the plaintiff was incurring losses of Kshs 5,000/- daily occasioning loss to Makao Capital Limited whose loan was now in default.
28. The parties canvassed all the applications by way of written submissions. The plaintiff's submissions were dated 8/12/2022 whereas those of the 2nd defendant were dated 9/12/2022.
29. This Court has considered the pleadings and the parties' submissions.
30. The Court will begin with the orders for stay sought in the plaintiff's applications. The record shows that upon the plaintiff filing the application dated September 30, 2022, the Court granted interim orders for stay on October 6, 2022. The motor vehicle was however repossessed on October 18, 2022 and sold by way of auction.
31. The plaintiff contended that the 2nd defendant was aware of the stay orders but still proceeded to execute the decree. Having carefully considered the evidence before Court, I could not trace any affidavit of service indicating that the orders were served on the 2nd defendant, and if so when. All that was available was a screen shot of a whatsapp message allegedly sent to the 2nd defendant and a person saved as "Ernest Auctioneer" forwarding a document titled 'order stay.pdf'. The contents of the document were however not available. Further, the same was sent on October 18, 2022 at 9:43.
32. In those circumstance, the Court is not convinced that the orders were served on the 2nd defendant or the auctioneers. Proof of service is normally by way of an affidavit of service sworn by a process server indicating the circumstances under which service was effected.
33. In a situation where the plaintiff waited 14 days before serving the 2nd defendant and only sent a document via whatsapp on October 18, 2022 after the subject motor vehicle had been repossessed and failed to return service, the Court cannot conclude that the orders were properly served.
34. Further, the plaintiff was casual in dealing with his application after obtaining the interim orders of October 6, 2022. The plaintiff failed to attend court for directions on October 12, 2022 whereby the stay order lapsed since it had been granted to last until that date.
35. The Court has considered the pleadings before the subordinate court which were produced. It is noted that the warrants of attachment dated September 22, 2022 were duly issued as well as a decree. There was also evidence of the sale including the advertisement for sale and memorandum of sale dated November 2, 2022. Having not been served with the orders staying execution, the 2nd defendant lawfully executed the decree.
36. It then follows that any orders seeking surrender of the motor vehicle or orders finding the 2nd defendant to be in contempt of court must fail. The events seeking to be stayed have already taken place such as there is nothing to stay and any orders issued would be in vain.
37. On the issue of whether the sale was lawful or at an undervalue, that is an issue that can only be dealt with by the court that issued the decree and not this Court.
38. The upshot is that the plaintiffs' applications dated September 30, 2022, October 4, 2022 and November 18, 2022 are all unmerited and are dismissed with costs to the 2nd defendant.



39. The Court now turns to the 2nd defendant's application dated November 30, 2022 and preliminary objection dated September 30, 2022.
40. I will first address the preliminary objection dated September 30, 2022.
41. A Preliminary Objection was described in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 to consist 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.
42. A preliminary objection raises pure points of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any fact has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.
43. The preliminary objection is grounded on inter alia the fact that the value of the declaratory orders was Kshs 750,657/- and was within the jurisdiction of the small claims or chief magistrates court. This touches on the jurisdiction of the court and the same amounts to a preliminary objection.
44. On jurisdiction of this Court, it is clear pursuant to Article 165 (3) of the *Constitution of Kenya, 2010* that this Court has unlimited original jurisdiction in criminal and civil matters save for matters exclusively within the jurisdiction of the Courts established pursuant to Article 162 of the *Constitution*.
50. In *Ndonye v Invesco Assurance Co. Ltd* (Civil Suit 23 of 2021) [2022] KEHC 416 (KLR) (5 May 2022) (Ruling) the court held that: -

“While I agree with the Interested party that these proceedings could have been commenced before the lower court, that does not mean that this court lacks the jurisdiction to deal with the matter. What the law provides that in the event that the Plaintiff succeeds, the costs are to be awarded on the Magistrate's Court's scale. Accordingly, the preliminary objection must fail since the Court has discretion to transfer the matter to the Magistrate's Court. The law is however that where the discretion of the Court is involved, a preliminary objection cannot be sustained.”

45. Though the Magistrates court has pecuniary jurisdiction to hear the matter, that does not automatically take away this Court's jurisdiction. Indeed, the Magistrates' Court has jurisdiction to hear and determine declaratory suit as was held in *Kenya Power and Lighting Company Ltd -vs- Quentin Wambua Mutisya T/A Bondeni Wholesellers* [2018] eKLR wherein Hon. Odunga J. cited a Court of Appeal decision and observed as follows: -

“Was the Respondent entitled to the declaratory order sought? It was contended that the Learned Trial Magistrate had no jurisdiction to issue a declaratory order based on the decision in *Stallion Insurance Company Ltd vs. David K. Nthuku* [1997]. That was a decision of the High Court However in *Corporate Insurance Company Ltd. vs. Elias Okinyi Ofire* Civil Appeal No 12 of 1998 [1999] 2 EA 61 the Court of Appeal held that:

“...as there is a certain amount of uncertainty in the profession as to whether or not a declaratory suit, such as was filed in the Senior Principal Magistrate's Court, could be filed in the magistrate's court we find it necessary to deal with the point. Mrs. Nyaundi for the appellant argued that it was a matter of notoriety that such cases can only be filed in the High Court. She quoted no authorities to support her proposition. It is true that there is such a general belief as urged by Mrs. Nyaundi. But that is not correct. Section 3(1)(c) of the *Judicature Act*, Cap. 8 Laws of Kenya, gives the High Court and all subordinate courts power



to exercise jurisdiction in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897. "Court" as defined in the *Civil Procedure Act* means the High Court or a subordinate court, acting in the exercise of its civil jurisdiction. "Suit" as defined in the *Civil Procedure Act* means all civil proceedings commenced in any manner prescribed. Order II rule 7 of the Civil Procedure Rules reads:

‘7. No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make a binding declaration of right’

As "Court" includes a subordinate court it has jurisdiction to make a declaratory order such as was sought by the respondent, provided the value of the subject-matter is within the jurisdiction of that court.”

Therefore the ground challenging the jurisdiction of the Learned Trial Magistrate to make a declaratory order must fail.”

46. The magistrate courts has jurisdiction to hear and determine this suit. Though the preliminary objection is not sustainable on that ground, this Court has discretion to transfer the matter to the lower court and final orders will be issued at the tail end of this ruling.
47. The other grounds raised in the preliminary objection include that the application was an omnibus application and was anchored on wrong legal provisions. The applications have already been determined upon and it is vanity to consider those grounds. Suffice is to note that an application will not be struck out for the mere reasons that it is anchored on the wrong provisions of the law.
48. The last issue for determination is the 2nd defendant’s application dated November 30, 2022 seeking that the 2nd defendant be struck out from the suit as there was no cause of action against him nor were there reliefs sought against him in the plaint.
49. Order 1 Rule 10 (2) of the *Civil Procedure Rules* also provides that: -

“The court may at any stage of the proceedings, either upon or without the application of either part, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendants, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
50. The main question is whether the 2nd defendant is a necessary party to the suit and if so, whether any cause of action is disclosed against him. The power to strike out a party from a suit should be approached with caution. This court has to assess whether or not there is a prima face case against the 2nd defendant.
51. This suit was instituted vide the plaint dated September 30, 2022. The plaintiff sought to enforce an alleged insurance policy between himself and the 1st defendant. The plaintiff claimed that the 1st defendant was eligible to settle the decree arising from MCC E614 of 2021 wherein the 2nd defendant filed the suit for harm suffered in accident while on board the plaintiff’s motor vehicle.
52. The plaintiff claimed that despite being notified of the suit and instructing the firm of Ahmednasir Abdikadir & Co. Advocates to represent the 1st defendant and the plaintiff, the 1st defendant failed



to settle the decree. The plaintiff thus sought a declaration that the 1st defendant was liable to satisfy the decree.

53. From the foregoing, there is no cause of action that is revealed as against the 2nd defendant. There is no allegation that the 2nd defendant was privy to the alleged policy contract such that he owed the plaintiff any obligation under the contract.
54. Further, it has already been established that the decree was lawfully executed by the 2nd defendant thus there is no cause of action as against him. If the suit is successful, the plaintiff will be able to recover compensation as against the 1st defendant. In the premises, the 2nd defendant is not a necessary party and he should be struck out of the suit.
55. Accordingly, in view of the foregoing, the Court makes the following orders: -
- a. The plaintiffs' applications dated September 30, 2022, October 4, 2022 and November 18, 2022 are all unmerited and are dismissed with costs to the 2nd defendant.
 - b. The application dated September 30, 2022 is allowed with costs and the 2nd defendant struck out of the suit with costs.
 - c. The Preliminary objection dated September 30, 2022 is dismissed with costs to the plaintiff.
 - d. This Court hereby exercises its discretion and transfers the suit to the Magistrate's Court for hearing and determination.

56 It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE, 2023.

A. MABEYA, FCIArb

JUDGE

