



**Oloo v Makokha (Being Sued as the Administrator of the Estate of the Late Akinneta Awinja Makokha) & another (Civil Appeal E044 of 2023) [2023] KEHC 19764 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19764 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E044 OF 2023  
PJO OTIENO, J  
JULY 7, 2023**

**BETWEEN**

**ANTHONY OKELLO OLOO ..... APPELLANT**

**AND**

**NELSON OTIPA MAKOKHA (BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE AKINNETA AWINJA MAKOKHA) ..... 1<sup>ST</sup> RESPONDENT  
INVESCO ASSURANCE COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Ruling of Hon. J. R. Ndururi (SPM) in Kakamega CMC Civil Suit No. E016 of 2022)*

**JUDGMENT**

**Background of the Appeal**

1. The Appellant sued the respondent seeking a declaratory order that the Respondent, as its insured, was bound to settle the decree entered against him in Butere PMCC No. 51 of 2019. The Appellant also filed an application dated November 29, 2022, and sought orders for the stay of execution of the Judgment and decree issued in Butere Civil Cause No 51 of 2019.
2. In resisting that application, the Respondent filed a Notice of Preliminary Objection and contended that the Court lacked the jurisdiction to entertain and determine the application for being an affront to the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*.
3. The matter came before the court on the March 9, 2023 when the Court delivered a Ruling holding that it had no jurisdiction to stay the execution of a Judgment by another Court of concurrent jurisdiction thus dismissing the application with costs.



4. Aggrieved by this Ruling, the Appellant filed a Memorandum of Appeal dated March 29, 2023 challenging the decision on the single ground that the learned lower court erred in law and fact by making a finding that it lacked jurisdiction to stay execution of the Judgment and/or decree vide Butere Civil Cause No 51 of 2019. The Appeal seeks that the Ruling be set aside and Appeal allowed with costs.
5. The Appeal was directed to be canvassed by way of written Submissions which have been filed by both parties. I have perused the Submissions filed and benefitted from the law relied upon therein.
6. However, it is worth noting that even though the decision and the Appeal were on the single issue on the jurisdiction of the Court to stay the Judgment of a concurrent Court, the Appellant has bludgeoned the disputed and grown it to question whether the subordinate Courts in general have jurisdiction to issue declaratory orders compelling an insurer to satisfy a decree passed in the primary suit against its insured; whether it would visit substantial loss on the Plaintiff in a declaratory suit and render the suit nugatory if stay pending determination of the suit is denied. In the courts view those issues are wholly outside the realm of the Memorandum of the Appeal filed and the decision challenged by the Appeal. The Court will confine itself to the dispute pleaded for it is bound by law not to invite a non-pleaded matter. To delve into those issues touching on the substance of the suit yet to be heard and determined would be preemptive and irregular.
7. For the Respondent, it is submitted that the Appellant challenged the decision of Butere SPM CC No 51 of 2019 in High Court at Kakamega in Appeal No 103 of 2022 and having done so the law under order 22 rule 22 mandates that only the Court that issued the decree, a Court where the decree has been set for execution or a Court having appellate jurisdiction in respect of the decree being executed that upon application can make orders for stay of execution. It is added that the application for stay ought to have been made either in Butere SPM CC No 51 of 2019 or in Kakamega High Court Appeal No 103 of 2022.
8. Even the Respondent appears to have gone beyond the boundaries of the dispute pleaded by the argument that the declaratory suit was filed pre maturely by placing reliance on the case of *Peter Kilonzo Kioko v Monarch Insurance Co Ltd & Another* Machakos HCC No E001 of 2020 where it was held that one cannot seek a declaration on a matter where an appeal on liability and quantum are pending. In conclusion it was contended that the filing of a declaratory suit is no bar to execution of a decree by a genuine decree holder and cited to court the decision in *Jenipher Anyango Oloo v Buzeki Enterprises Limited & another* [2021] eKLR.

### **Issue, Analysis and Determination**

9. This Court has considered the single ground of appeal, the Ruling of the lower court and the submissions by the parties and discerns the only issue for determination to be whether a court has the jurisdiction to stay the execution of a judgment and decree issued by another court of concurrent jurisdiction.
10. The dismissed application was not premised on any of the provisions of the Civil Procedure Act nor the Rules but on section 10(1) of *The Insurance (Motor Vehicle, Third Party Risks) Act*. While failure to cite the law upon which an application is grounded is not fatal<sup>1</sup>, a court of law must have a legal basis to grant an order and needs to cite under what provision of the law is order is grounded. It is therefore common Knowledge that every court should be in charge for the enforcement of its orders hence the restriction that it is the court issuing the order, that to which the order is sent for execution of the court

<sup>1</sup> Order 50 Rule 6, civil Procedure Rules



to which an appeal is preferred to consider granting stay of such orders to meet the ends of justice<sup>2</sup>. It is clear to the court that section 10(1) of [cap 405](#) does not confer the appellant to seek and be given an order for stay pending a suit.

11. In this matter, it is submitted without rebuttal that there is an appeal pending before this court to which an appropriate stay could have been sought. It is also not disclosed to court whether an application for stay pending appeal has been preferred before the trial court and the appellate one.
12. If the words of the rules were not as compelling to the Appellant, the provision of section 34 of the [Civil Procedure Act](#) need to be a good guide. The law mandates: -

“ All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”
13. The provision has been subjected to interpretation by courts and the concurrence is that every question involving the enforcement or execution of a decree must be dealt with in the suit the decree was issued and never by a separate suit. See [Nazir Jinnab v Asmahan Peterson & 2 others](#) [2013] eKLR, [Agriculture, Food and Fisheries Authority v Joseck Ibrahim Okwemwa](#), and [South Nyanza Sugar Co Ltd v Alfred Sagwa Mdeizi t/a Pave Auctioneers](#) [2010] EKLJ, J.
14. For the reasons that there is no jurisdiction in a court of concurrent jurisdiction to countermand the decree of another by an order for stay pending suit, I find that the determination by the trial court cannot be faulted but must be upheld as the proper exposition of the law. This court upholds the decision that the trial court lacked the jurisdiction to stay a decree issued by a court of concurrent jurisdiction.
15. Accordingly, for the reasons set out above, this court finds that this Appeal lacks any merit and is thus dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7<sup>TH</sup> DAY OF JULY 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:-**

Ikhumba for the Appellant

Mr. Mudala for the 1<sup>st</sup> Respondent

Court Assistant: Polycap

<sup>2</sup> Order 42 Rule 6

