



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**CIVIL SUIT NO. E011 OF 2021**

**ANDREW LINGE MUTUA.....PLAINTIFF/APPLICANT**

**VERSUS**

**GEMINIA INSURANCE COMPANY LIMITED.....DEFENDANT**

**AND**

**ZIPPORAH MWENDE MUTUA.....INTERESTED PARTY**

**RULING**

1. By a Motion on Notice dated 2<sup>nd</sup> June, 2021, the Plaintiff/Applicant herein seeks stay of execution of the decree issued in Machakos Chief Magistrate Court Civil Case Number 312 of 2018 - **Zipporah Mwende Mutua vs. Andrew Linge Mutua** and all consequential orders pending hearing and determination of the intended declaratory suit.

2. According to the Applicant, he is the judgment debtor and was the owner of motor vehicle registration number KAZ 571T involved in the accident of 25<sup>th</sup> December 2017 wherein the interested party suffered injuries. Consequently, the Interested Party instituted Machakos Chief Magistrate Court Civil Case Number 312 of 2018 - **Zipporah Mwende Mutua vs Andrew Linge Mutua**. At the time of the said accident, the subject motor vehicle had a valid insurance policy with the Defendant being policy number PC/01/1778815/1. According to the Plaintiff, under Section 10(1) of the ***Insurance Motor Vehicle (3<sup>rd</sup> Parties Risks) Act Cap 405***, (the Act) 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).

3. It was averred that the Plaintiff herein was insured by the Defendant who instructed a firm of Advocates to enter appearance and defend the Plaintiff. The Advocate entered appearance, filed defence and a witness statement by the Plaintiff's authorized driver denying any negligence on their part.

4. However, the Defendant and its appointed agent, the Advocate, conducted the trial without involving the Plaintiff/Applicant and only communicated to the Plaintiff the outcome of the proceedings and entry of judgement after the payment of Kshs. 3,000,000/- by the Defendant towards the judgement sum. The communication was to the effect that the Plaintiff was liable to the payment of the balance of the judgement sum. According to the Plaintiff, the Defendant herein in acknowledgement of the judgement entered in **Machakos Chief Magistrate Court Civil Case Number 312 of 2018**, and in utter contravention of the above stated provision, made a payment of Kshs.

3,000,000/- only and exposed the Plaintiff to execution proceedings for the balance of the decretal amount.

5. In support of his case the Plaintiff relied on the case of Justus Mutiga & 2 Others vs. Law Society of Kenya & another [2018] eKLR where the Court of Appeal held:

**“In addition, that limitation goes against the objective of compulsory third party motor vehicle insurance...However, unlike the present system section 10 of the Ordinance imposed a duty on the insurer to compensate fully an insurance claim as raised by the injured third party and as sanctioned by the courts. Where the amount was higher than what was covered by the insurance policy taken by the insured, the insurer was still obliged to fully compensate the injured third party but subsequently recover the excess from the insured. This is what was colloquially referred to as the principle of ‘excess’ in insurance in Kenya. That provision in our view, managed to protect the injured third party while also protecting the interests of the insurer by allowing the insurer to recover from the insured, any excess amount without capping the amount which the insurer could pay as compensation.”**

6. Further reliance was placed on Monarch Insurance Company Limited vs. Moses Caleb Ochnago & Another [2019] eKLR where it was held that:

**“Though the appellant contends that the limitations is justified no evidence was adduced to prove that justification. If anything, limiting the compensation payable by the underwriter who has received premiums, particularly in the face of an innocent third party who is armed with a court judgement is unjustifiable. It offends the very essence of insurance which is to ensure mitigation against risks that result in loss. In particular, it defeats the very objective of compulsory third-party insurance cover if an innocent victim is left to recover the bulk of his claim against the insured personally.”**

7. It was the Plaintiff’s position that he would suffer irreparable loss if the orders sought herein are not granted by being forced to bear a financial burden which he should not have to bear in the first place and which in essence, will not even satisfy the decretal amount sought in the decree since from the Proclamation Notice annexed, attachment was done on items that can barely fetch half the decretal sum of Kshs. 1,064,040 and which are further best described as tools of trade. On the other hand, if the declaratory suit were to succeed, it would follow that the Defendant would be liable to settle the balance of the decretal sum in favour of the Interested Party. It was noted that the Defendant had not filed any objection to the application therefore demonstrates they are not objecting to it.

8. In the Applicant’s view, in these circumstances, justice would be done to all the parties if there was a stay of execution to enable the Plaintiff/Applicant to prosecute his case with an aim to recover the wholesome of the judgement in favour of the Interested party.

9. The Plaintiff/Applicant contended that it had moved the court without unreasonable delay and undertook to prosecute the declaratory suit with expediency. He therefore prayed that the court allows the Application dated 2<sup>nd</sup> June 2021 as prayed.

10. In response to the application, the Interested Party relied on the affidavit sworn by her advocate, **Evans Mochama**, who deposed that the plaintiff/applicant herein was fully aware of the existence of proceedings in Machakos Civil Suit No. 312 of 2018 having been a party to the proceedings as a defendant and having been served with summons to enter appearance. It was deposed that the plaintiff/applicant herein were insured by the defendant/respondent herein in the proceedings in the said case and the defendant/respondent herein as the insurers of the plaintiff/applicant exercised their insurance Subrogation Rights and appointed the law firm of Njongoro & Co Advocates. It was therefore averred that being a party to the said proceeding, every step and details of the proceedings therein is presumed to have been communicated by his own advocate on record or insured the defendant herein. To the deponent, the plaintiff/applicant herein has not shown any diligence in the matter by disclosing the steps, efforts or follow ups he did to ascertain the position of his file knowing that the matter was pending in court.

11. According to the deponent, **it is** not a defence for the plaintiff/applicant to allege ignorance or unawareness of the Insurance Terms Policy of statutory bound maximum of Kshs. 3,000,000/-of which the defendant/respondent has already met and paid. It was averred that despite the plaintiff/applicant herein being aware of his indebtedness of the decretal sum as well as several correspondences, they are adamant in not settling the same.

12. The deponent’s position was that the issues which will be determined at the declaratory suit shall be between the defendant/respondent and plaintiff/applicant herein and shall have nothing to do with the interested party herein and in the event of a success if any, its remedy and compensation shall be by the defendant/respondent herein and not by the interested party. Since the plaintiff/applicant herein is insinuating professional negligence on the part of former advocate on record, it was averred that he has right and remedy in filing case for professional negligence but not to continue tying the interested party herein.

13. According to the deponent, the declaratory suit against the defendant/applicant and interested party herein is not merited and the same is meant to arm twist and malign the previous advocates on record as he would not have acted without express instruction and hence the same is only intended to waste court’s judicious time. In his view, it is not fair and just to allow the plaintiff/applicant to continue prejudicing the interested party as the case has been before Court since 23<sup>rd</sup> May 2018 and is entitled to her fruits Judgement which was delivered on 4<sup>th</sup> April 2019. It was further averred that the plaintiff/applicant has to come to court with unclean hands hence undeserving of the orders of stay being sought. As such this application lacks merit and same should be dismissed with costs.

14. On the issue of subrogation, the Interested Party relied on Octagon Private Investigation Security Services vs. Lion of Kenya Insurance Co. [ 1994] eKLR and Akamba Public Road Services vs. Abdikadir Adan Galgalo [2016] eKLR, and submitted that the Plaintiff was bound by the actions taken by the advocates appointed by his insurer as held in Flora N. Wasike vs. Destimo Wambolo [1988] eKLR and K.C.B LTD vs. Specialised Engineering Co Ltd [1982] KLR.

15. It was submitted that the applicant herein is guilty of laches as he was notified of his indebtedness via the letter dated 24/4/2019 but only

came to file this current application on 2<sup>nd</sup> June, 2021 being more than 2 years later. According to the Interested Party, an insurance can only pay what is statutory bound maximum limits of Kshs 3 Million hence to grant the stay sought would be an exercise in futility.

16. While appreciating that the prayers being sought are discretionary in nature, it was submitted that the plaintiff/applicant herein does not qualify for the same as he came to court with unclean hands hence the application dated 2<sup>nd</sup> June 2021 is unmerited, scandalous and ought to be dismissed with costs to the interested party.

### **Determination**

17. I have considered the application, the affidavits both in support of and in opposition to the application herein as well as the submissions filed.

18. In this case it is not disputed that the Plaintiff/Applicant is the judgement debtor in the primary suit where the Interested Party is the decree holder. The Applicant contends that the Defendant was the insurer of the vehicle which caused the accident the subject matter of that primary suit and that contention is not challenged by the Defendant herein. In this suit, the Applicant seeks to compel the Defendant to meet its obligations under the contract of insurance by satisfying the said decree. In the meantime, he seeks to have the execution and proceedings in the primary suit stayed. There is no doubt that the said order of stay if granted will affect the interests of the Interested Party herein. In **Brek Sulum Hemed vs. Constituency Development Fund Board & Another [2014] eKLR** the court held that;

**“As necessary parties, the provisions of rule 10 Order 1 will apply to require that their involvement to be necessary for the court to effectually and completely adjudicate upon and settle all questions involved in the suit’. As Interested parties, the applicants need only demonstrate interest in the subject of the suit or in other relevant matter affecting the suit...and in giving effect to the Article 159 principle of substantial justice without undue regard to technicalities of procedure, I allow the applicants’ application for them to be joined in the suit, as necessary or interested parties.”**

19. In **Departed Asians Property Custodian Board –V- Jaffer Brothers Ltd Supreme Court of Uganda (1999) I.E.A 55** it as held that:

**“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit ..... A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter.”**

20. Similarly, the Supreme Court of Kenya in **Trusted Society of Human Rights Alliance –vs- Mumo Matemo & 5 Others (2014) eKLR** held as follows with regard to an interested party:

**“Suffice it so say that while an interested party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom. Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. (emphasis added).**

21. Further, in **Gateway Insurance Co. Ltd –v- Moses JaikaLuvai (2008) eKLR**, Ibrahim, J (as he then was) stated that:

**“The plaintiffs in the suits which the insurer seeks to avoid liability under Section 10(1) by way of declaratory suit must be notified of the institution of the declaration suit and after which the said Plaintiffs are entitled to be made parties to the Insurer’s suit if they think fit. The provision is mandatory and the Court has no discretion on the matter. The discretion and election lies with the Plaintiffs who have sued the insured for damages and losses arising from motor accidents. It is a right which none of the parties or the Court can take away.”**

22. In **Fidelity Shield Insurance Company Limited vs. Joseph IhaWanja [2018] eKLR** it was held that:-

**“An interested party is the one who has a stake in the proceedings though he was not a party in the cause ab intio. This is in line with the definition quoted above. The party must demonstrate that it is necessary for him to be joined as a party to enable the court to settle all the questions involved in the suit. It is not sufficient for a party to state he has an interest he must convince the court that his being enjoined in the suit is crucial and will be necessary to assist the court in the determination of the questions involved in the suit. The applicant has stated the factual basis for this application which she has indicated is not in dispute and the facts are pleaded in the plaint. The pleading by the plaintiff is alleging a breach of the policy. Simply stated the plaintiff is seeking to avoid liability to pay the interested parties. It is based on a claim that the defendant was not using the motor vehicle on that particular day for the insured purpose. The plaintiff seeks a declaration that he is not bound to settle decree in Baricho R. M. C.C. 36, 37, 38, 39, 40 & 41 of 2013 or any other suit that maybe filed in future on account of suits having arisen in breach of the express provisions of the own goods master comprehensive policy No. MC 03312 887. There is no doubt that the decision of this court will affect the rights and interests of the interested party. The interested party has a stake and or interest in the case. This was well stated in the Supreme Court in *Trusted Society of Human Rights Alliance –v- Mumo Materu& Others*, (Supra). The applicant will be affected by the decision and has a stake in the proceedings. The interest of Justice demands he be party in the proceedings. This matter is brought under section 10 of the Insurance *Motor Vehicle 3<sup>rd</sup> Party Risk*) Act. The provision makes it mandatory for the Insurer to settle the**

**Judgment(s) in respect of persons it has insured against claims by 3<sup>rd</sup> parties. Such claims are where death or bodily injuries has resulted from an accident involving the vehicles insure under the Act. Section 10(4) is mandatory that a person who has been given notice of the proceedings to repudiate liability shall be entitled if he thinks fit to be made a party thereto. It means that if such a party wishes to be enjoined in the suit, the court has no discretion, it has to allow such a party to be enjoined in this suit. I am in agreement with the decision of Justice Ibrahim as he then was in the case of *Gateway Insurance Co. Ltd –V- Moses Jaika Luvai*, (Supra) that if the party applies to be joined in the suit the court is without discretion, it must allow him. Where a party has been given a right by a statutory provision to be enjoined in a suit, the plaintiff or the party cannot take away the right. I am in agreement with the counsel for the interested parties that the interested party has the legal basis in Section 10(4) of Insurance Act to be enjoined in this suit.”**

23. Based on the said decisions I am satisfied that the Interested Party is properly joined to these proceedings.

24 In the instant application, the Applicant seeks stay execution of the decree in the primary suit pending the determination of this suit. However, 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.

25. However, one cannot close his eyes to the fact that the Applicant is in effect seeking that the Defendants pays the Interested Party the sum due to the Interested Party from the Applicant. Unless some measure of protection is given to the Applicant, his suit as presently framed may well be an academic exercise. To that limited extent I agree with the reasoning in the case of Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & Another [2014] eKLR where the court stated as follows:

**“Secondly, that unless such stay is granted, the intended suit shall be rendered nugatory. In my analysis, I have found that if stay is not granted, the court will be assisting the defendant to avoid a contract whose terms are dictated by statute, to compensate the interested parties herein then revert to the plaintiff to recoup any extra sums that they may have paid to third(interested) parties...I must also consider whether granting the stay sought will in any way prejudice the interested parties who have opposed this application. The interested parties being persons covered under Section 4 (1) of the Act-Cap 405 Laws of Kenya, the liability of the defendant is preserved as against them and they could as well, sue the defendant by way of a declaratory suit to recover the sums due as per the decrees in their favor...However, the plaintiff has opted to carry that burden on their behalf. If the suit herein is determined in favor of the plaintiff, then the interested parties stand to benefit directly. They need not file any other declaratory suit against the defendant. For that reason therefore, time and resources, will also be saved for the interested parties. Therefore, no prejudice will be caused to them.”**

26. I must however state that the primary obligation of settling the decree falls squarely on the Applicant and in the event the Defendant as his insurer fails to satisfy the decree, the Applicant will still be called upon to satisfy the same. The mere fact that the Defendant is bound both contractually and statutorily to satisfy the decree does not absolve the Applicant from meeting his obligations under the tort of negligence. It must be noted that nothing prevents the Applicant from settling the decretal sum and then suing the Defendant for compensation or reimbursement.

27. It is my view that in these circumstances, justice would be done to all the parties if there was a stay of proceedings for a short period to enable the Applicant prosecute his case. Accordingly, I hereby grant an order staying execution in Machakos Chief Magistrate Court Civil Case Number 312 of 2018 pending the determination of this suit on condition that the Plaintiff/Applicant prosecutes his case within 60 days from the date of this ruling. In default the stay will automatically lapse.

28. The costs of this application are awarded to the Interested Pray in any event.

29. Liberty to apply granted.

30. It is so ordered.

**RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2021**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Mbanda for the Plaintiff/Applicant**

**CA Susan**