REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CIVIL APPEAL NO. E020 OF 2024

TRIDENT INSURANCE COMPANY LIMITED….APPELLANT/APPLICANT

VERSUS

LUKAS MUGO WANGARI……RESPONDENT

RULING

1. The Appellant/Applicant has filed an application dated 30th September 2025 seeking for orders that:

(1) Spent

(2) Spent

(3) This Honourable court be pleased to stay the execution of judgment in the various declaratory suits being Hola MCCC No. E052 of 2024 – E056 of 2024, E062 of 2024 – E067 of 2024, E074 – E0102 of 2024 and E118 of 2024 – E121 of 2024 pending the hearing and determination of the appeal.

(4) This Honourable court be pleased to consolidate the various appeals herein being Garsen HCCA No. E010 of 2024, E020 of 2024 - E028 of 2024 and E030 of 2024 – E068 of 2024 pending the hearing and determination of the appeal and make this file, EO20 of 2024, the lead file in the circumstances.

2. The application is based on grounds stated on the face of the application and supported by the affidavit of the legal officer of the Applicant, James Onyoro.

3. The case for the Applicant is that the Respondent and 48 or so other claimants obtained judgments against one Boniface Mwangi Kang`ethe after a motor vehicle for the said Mr. Kang`ethe that was insured by the Applicant was involved in an accident. After judgment was obtained the claimants filed declaratory suits against the Applicant. That the Applicant filed statements of defence dated 29th July 2024 in opposition to the various declaratory suits which they amended on 25th September 2024 and served on the claimants. That the claimants proceeded to file an application dated 3rd September 2024 seeking that the statements of defence dated 29th July 2024 be struck out for being abuse of the process of the court. That the trial court in a ruling delivered on 5th December 2024 struck out the Applicant`s statement of defence dated 29th July 2024 and entered judgments for the claimants but that the Applicant`s amended statement of defence was left intact.

4. That dissatisfied with the ruling, the Applicant brought the various appeals stated in paragraph 1 above which they contend arose from the same cause of action and seek their consolidation.

5. It is further contended that the Applicant under the doctrine of subrogation represented Mr. Kan`gethe from the primary suit, in the declaratory suits and in Garsen HCCA No.E006 of 2024.

That the High Court granted a stay of execution on the judgment entered in the primary suits. That subsequently, Mr. Kang'ethe filed a Notice to act in person together with a Notice of Withdrawal of the said appeal and subsequently appointed an advocate to act for him in the appeal. That the issue of insurance cover is hotly contested as Mr. Kang'ethe took out insurance cover for 2 passengers and not 47 passengers as contended by him.

6. Arising from the above, the Applicant contends that the appeals herein will be rendered nugatory if the Respondent proceeds with the execution. That the Applicant has an arguable appeal with high chances of success and risks being condemned unheard on the judgments entered in the primary suits unless the application is allowed. That the Respondent does not stand to suffer any prejudice should the orders sought be granted. That it is in the interests of justice for the application to be allowed.

7. The application was opposed by the Respondent vide the replying affidavit of his counsel, Mr. Geoffrey Kilonzo. Counsel deposed that this court has no jurisdiction to entertain the application as the Applicant filed an appeal under the doctrine of subrogation in HCCA EOO6 of 2024 seeking for stay of execution pending the appeal and the court granted the stay orders. Therefore, that the Applicant is estopped from filing an application for stay pending appeal when a similar application was heard and determined to finality.

8. That the Applicant through the affidavit of its legal officer, James Onjoro, admitted to have filed the appeal on the basis of the doctrine of subrogation and they are now estopped by the doctrine of estoppel from seeking similar orders in this suit. That the application is akin to prosecuting appeal No.HCCA E006 of 2024 through the window since the facts are the same. That the allegation that the doctrine of subrogation is applicable is false as the court has already pronounced itself in HCCA 006 of 2024 vide a ruling delivered on 6/10/2025.

9. It was averred that the application has been overtaken by events as the court has issued a garnishee order absolute and no stay can issue when execution is on motion.

10. Further that the application is defective and incompetent as it purports to seek orders in the matters whereof there are no applications filed and hence the court cannot consolidate that which does not exist. That there are no orders in force in HCCA E006 of 2024 as the said appeal was withdrawn.

11. It was averred that the judgment in the primary suits was by consent of the parties and the Applicant undertook to settle the decretal sum. That it is trite law that consent judgment cannot be overturned unless there is proof of fraud. That as per the sticker issued to the insured he accident vehicle was licenced to carry 60 passengers. That the Applicant has no arguable appeal. The Respondent urged the court to dismiss the appeal.

12. The application was canvassed by way of written submissions.

Applicant`s submissions

13. The Applicant submitted through his counsel that consolidation of suits is allowed by Order 11 rule 3(1)(h) of the Civil procedure Rules. The Applicant relied on the case of **Selecta Kenya Gmbh & Co. KG v Chase Bank Kenya Limited & 2 others [2018] KEHC 10025 (KLR)** where the court considered the principles set out in the case of **Nairobi ELC Suit No. 1000 of 2012 Joseph Okoyo vs Edwin Dickson Wasunna (2014) eKLR,** which cited with approval the case in **Mombasa HCCC No. 992 of 1994 Nyati Security Guards and Services vs Municipal Council of Mombasa** wherein the factors were enumerated as follows;-

> **“The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-**
>
> **(a) Some common question of law or fact arises in both or all of them; or**
>
> **(b) The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or**

(c) For some other reason it is desirable to make an order for consolidating them."

14. Also cited on the issue is the case of **Joseph Okoyo v Edwin Dickson Wasunna (2014) eKLR** where the court cited with approval the case of **Korean United Church of Kenya & 3 others v Seng Ha Sang (2014) eKLR** that:

> **"Consolidation of suits is done for purpose of achieving the overriding objective of the Civil Procedure Act, that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action."**

15. It was submitted that the declaratory suits stem from the same cause of action. That the primary suits were consolidated at the lower court and so were the declaratory suits. That the appeals herein are ripe for consolidation.

16. The Applicant submitted that the Applicant was condemned unheard in that the trial court struck out the Applicant`s statement of defence dated 29th July 2024 and proceeded to enter judgment against the Applicant and by error failed to take cognizance of the Applicant`s amended statement of defence dated 25/9/2025. It was submitted that the entry of judgment in the declaratory suit was a nullity as no judgment could have been

entered unless the amended defence is struck out. That this rendered the subsequent execution proceedings nullity. The Applicant cited the case of **Benjamin Leonard Mcfoy v United Africa Company Limited** (UK) [1962] AC 152, where Lord Denning observed that:

> **"If an act is void, then it is in law a nullity. It is not only bad ...and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."**

18. It was submitted that the entry of the judgment was irregular and unconstitutional.

19. The Applicant submitted that the draft defence annexed to the application seeking to set aside interlocutory judgment raised triable issues as follows:

a. Whether the Appellant herein should settle the Judgment sum in the primary suit.
b. Whether there is a valid contract between the Appellant herein and Mr.Boniface Kamau Kangethe.
c. Whether the contract of insurance was breached by Mr.Boniface Kamau Kangethe
d. Whether the Appellant herein should settle only two suits or all the 47 suits I the series.

e. Whether the Appellant was granted an opportunity for fair hearing.
f. Whether the learned magistrate erred in entering judgment against the Appellant herein.
g. Whether the Applicant was serviced with the statutory Notice.
h. And many more……

20. It was submitted that all that an applicant in an application for stay pending appeal is required to establish is that he that he has a triable issue which does not mean a defence that must succeed. Reliance was placed in the case of **Desbro (Kenya limited v Polypipes Limitd & another (2018) KLR** where the court cited with approval the case of **Saudi Arabian Airlines v Premium Petroleum Company Ltd (2014) eKLR** that:

> "**I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. The power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is "demurer of something worse than a demurer" beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the Shedridan J Test in Patel V E.A. Cargo Handling Services Ltd.**

[1974] E.A. 75 at p. 76 (Duffus P.) that "… a triable issue… is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away."

21. It was submitted that the prejudice suffered by the Applicant cannot be compensated by damages in the event there is no stay of execution as the appeal will be rendered nugatory. That there are 49 claimants who are unknown to the Applicant and it will be difficult to recover the cost from them in the event the Respondent proceeds to execute.

22. It was submitted that the doctrine of estoppel does not apply in the circumstances of this case.

23. On whether stay of execution ought to be granted, the Applicant submitted that the Applicant seeks to preserve the decretal amount issued by the court pending determination of the intended appeal. That allowing execution to issue would render the intended appeal nugatory.

24. The Applicant urged the court to exercise its discretion in favour of the Applicant and cited case of **Butt v Rent Restriction Tribunal (1982) KLR 417** where the court held as follows on the discretion of the court.:

"1. The power of the court to grant or refusal an application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.

2. The general principle is granting or refusing a stay is: If there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion. (sic) (trial court judgement).

3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the applicant at the end of the proceedings.

4. The court in exercising its powers under order XLI rule 4 (2) (b) of the civil procedure Rules can order security upon application by either party or on its own motion. Failure to put security of costs as ordered with cause the order for stay of execution to lapse".

Respondent`s submissions

25. Counsel for the Respondent submitted that the court has no jurisdiction to entertain the application as the Applicant filed an appeal under the doctrine of subrogation in place of Boniface Kamau Kang`ethe seeking for stay of execution pending appeal which was granted by this court. That the Applicant was the actual applicant in Garsen HCCA E006 of 2024 under the doctrine of subrogation and is now estopped from filing a similar application when the referred to appeal was heard and determined with finality. Counsel submitted that litigants cannot evade the doctrine of res judicata by substituting or adding parties. That the application is akin to prosecuting appeal No.HCCA E006 of 2024 through the window since the facts are the same. Reliance was placed in the case of **Africa Oil Turkana**

Limited (Previously known as Turkana Drilling Consortium Ltd) & 2 others vs Permanent Secretary, Ministry of Energy & 17 others (2016) eKLR.

26. On consolidation of the files, it was submitted that consolidation is a legal and procedural tool used by courts to combine existing and pending legal matters. That the application herein is defective and incompetent as it purports to seek orders in other matters whereof there are no applications filed yet a court cannot order consolidation of that which does not exist.

27. It was submitted that the Applicant does not have an arguable appeal as the consent judgment was by consent of the parties where there was no coercion or undue influence. More so that the vehicle as per insurance sticker issued by the Applicant the insured motor vehicle was licenced to carry 60 passengers. That the application was filed 9 months after the Applicant became aware of the judgment and therefore the delay is inordinate and inexcusable. That the applicant is guilty of laches. That equity aids the vigilant and not the indolent.

Analysis and determination

28. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions by the respective counsels for the parties. The issues for consolidation are:

(1) Whether the appeals should be consolidated.

(2) Whether the application is res judicata and whether the doctrine of estoppel is applicable in the case.

(3) Whether the appeal raises triable issue(s).

(4) whether stay of execution ought to be granted.

Whether the appeals ought to be consolidated

29. Consolidation of suits is allowed by Order 11 rule 3(1)(h) of the Civil procedure Rules, 2010. The principles under which suits can be consolidated have been ably set out above in the submissions of the counsel for the Applicant. The object of consolidation as stated in the case of *Selecta Kenya* (ibid) is to avoid multiplicity of litigation between the same parties whenever the matter in issue is substantially and directly the same. In the present matter the appeals sought to be consolidated stem from the same cause of action and they are represented by the same advocates. It will therefore save the court`s time and avoid multiplicity of suits if the appeals are consolidated. I therefore find the prayer for the consolidation of the stated appeals to be merited.

Whether res judicata

30. The Respondent argues that the matter is res judicata because the Applicant had filed a similar application in Garsen HCCA No.E006 of 2024 that was dismissed by this court.

31. Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya defines the doctrine of Res Judicata in the following terms: -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and <u>finally decided</u> by such Court.”

32. The Black`s Law Dictionary 10th Edition defines “res judicata” as:

“An issue that has definitely been settled by judicial decision….the three essentials are –

(1) an earlier decision on the issue

(2) a final judgment on the merits, and

(3) the involvement of the same parties, or parties in privity with the original parties.”

33. In **re Estate of Riungu Nkuuri (Deceased) [2021] eKLR** the court stated as follows:

“The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the Civil Procedure Act. *In Independent Electoral & Boundaries Commission vs*

Maina Kiai & 5 Others [2017] eKLR, **the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:**

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

34. The doctrine of res judicate applies in a matter where the issue in contestation has been decided with finality by a court of competent jurisdiction. This court dismissed the appeal in Garsen HCCA No.E006 of 2024 on a technicality that the appeal was filed by the Applicant herein under the doctrine of subrogation on behalf of his insured when the Applicant could not properly invoke the doctrine of subrogation in the case in that one of conditions precedent in a claim under the doctrine of payment to the

insured had not been met. The appeal having been dismissed on that technicality, the issues that were in contestation in the appeal were not decided with finality by the court. Though the parties in the present appeal are the same as were in Garsen HCCA E006 of 2024, there was no decision made on the merits of the case in Garsen HCCA E006 of 2024. There having been no decision made with finality on the merits of the appeal, the doctrine of res judicata does not, in my view, apply. The application herein is thereby not res judicata and the doctrine of estoppel does not apply in the case.

Whether the appeal raises triable issues

35. The law is settled that a court can enter summary judgment where there is no plausible defence entered by the other party. This can be done where the defence entered does not raise a triable issue. As to what amounts to a triable issue was considered in the case of **Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR** where the Court of Appeal held that:

> **"Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary**

judgment or in any other manner. What then is a defence that raised no bonafide triable issue. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term 'triable' as 'subject to liable to judicial examination and trial.' It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.

36. The Applicant argues that the trial court in entering judgment for the Respondent considered the Applicant`s statement of defence dated 29th July 2024 and failed to consider the Amended statement of defence dated 29th September 2024. That the trial court was in error in failing to consider the amended defence and consequently the entry of judgment was irregular. The Respondent did not offer a reply to this averment. In the absence of a reply, I find the issue to be one that requires further interrogation by the court and is therefore a triable issue.

Whether application for stay is merited

37. Under Order 42 Rule 6 of the Civil Procedure Rules, 2010 an applicant for stay of execution pending appeal is required to satisfy the court that:

(1) Substantial loss may result to the applicant unless the order is made;

(2) That the application has been made without unreasonable delay; and

(3) The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

38. The Applicant submitted that they are seeking to have the decretal sum preserved pending the hearing of the appeal. That if the orders sought are not granted the appeal will be rendered nugatory. That there are about 49 plaintiffs who are unknown to the plaintiff and it will be difficult to recover the cost from them in the event that the Respondent proceeds to execute.

39. In view of the big number of Respondents claiming against the Applicant, there is all likelihood that they are not known to the Applicant. The Respondents are in total executing a sum of about Ksh.19 million in the consolidated suits. This is quite a big sum of money. It may be difficult for the Applicant to recover the money from the many Respondents in the event that the appeal succeeds. This may occasion the Applicant substantial loss.

40. The other condition for stay of execution pending appeal is that the Applicant has to furnish security for the due performance of the decree. The court has discretion in making an order for security.

41. In granting stay of execution pending appeal, the court has the duty of balancing the interests of both parties where one party has a decree in its favour and the other one is desirous of

exercising its right of appeal. Considering that the total decrees obtained against the Applicant in the consolidated suits is to the total sum of about Ksh.19 million, I am of the view that the applicant should furnish security for due performance of the decree. Consequently, I find the application for stay of execution to be merited on condition of deposit of security.

42. The upshot is that the application is allowed as follows:

(1) The court hereby grants stay of execution of judgments in the various declaratory suits as named in prayer 3 of the Notice of Motion dated 30th September 2025 pending the hearing and determination of the appeals herein.

(2) The court hereby grants the prayer for consolidation of the various appeals as named in prayer 4 of the Notice of Motion dated 30th September 2025, with the lead file being Garsen HCCA E02O of 2024.

(3) The Applicant is hereby ordered to deposit security with this court in the form of a bank guarantee from a reputable bank in the sum of Ksh.19 million within 45 days from the date hereof, failure to which the orders granted herein shall stand vacated.

(4) The costs of the Application to abide by the outcome of the appeals.

Orders accordingly.

Delivered, dated and signed at GARSEN this 29th day of January, 2026

J. N. NJAGI

JUDGE

In the presence of:

Mr. Wamalwa for Appellant/Applicant

Mr. Wambua Kilonzo for Respondent

Court Assistant - Rahma