

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CONSTITUTIONAL PETITION NO. E005 OF 2025**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 20, 21, 22, 23, 24,  
25(c), 40(3), 50(1), 48, 159, 258 AND 259 OF THE CONSTITUTION OF  
KENYA, 2010**

**AND**

**IN THE MATTER OF CONSTITUTIONAL PETITION BY SIMON  
KIMELI KIPTANUI AGAINST VIOLATIONS OR ANTICIPATED  
VIOLATIONS OF HIS RIGHTS AND FUNDAMENTAL FREEDOMS  
ENSHIRED UNDER THE CONSTITUTION BY THE PROBABLE  
EXECUTION BY THE INTERESTED PARTY AS AGAINST THE  
PETITIONER**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION  
OF RIGHTS AND FUNDAMENTAL FREEDOMS AND  
ENFORCEMENT OF THE CONSTITUTION) PRACTICE AND  
PROCEDURE RULES 2013**

**AND**

**IN THE MATTER OF THE INSURANCE (THIRD PARTY RISKS) ACT  
CAP 405, INSURANCE ACT CAP 487**

**AND**

**IN THE MATTER OF THE INSOLVENCY ACT NO.18 OF 2015**

**BETWEEN**

**SIMON      KEMELI      KIPTANUI      .....  
PETITIONER**

**VERSUS**

**INSURANCE      REGULATORY      AUTHORITY      .....1<sup>ST</sup>  
RESPONDENT**

**INVESCO      ASSURANCE      COMPANY      LIMITED      .....2<sup>ND</sup>  
RESPONDENT**

STATUTORY MANAGER .....3<sup>RD</sup> RESPONDENT  
POLICY HOLDER COMPENSATION FUND .....4<sup>th</sup>  
RESPONDENT  
ATTORNEY GENERAL  
.....5<sup>th</sup>RESPONDENT

**RULING**

1. By a Notice of Motion dated 11/02/2025, the Applicant seeks the following orders:

- 1) Spent.
- 2) That interim orders do issue staying the execution of the judgement dated 17<sup>th</sup> October 2024 in Eldoret Civil Suit No. E941 of 2022 Paul Kiprotich Choge Vs Simon Kimeli Kiptanui together with the warrants of attachment issued to Seventy Seven Auctioneers.
- 3) A declaration that the 3<sup>rd</sup> Respondent’s actions are brazen, illegal, egregious, discriminatory and violate the Petitioners constitutional rights.
- 4) A declaration to quash the decision of the Policyholders Compensation Fund by capping the maximum claim at Kshs. 250,000/= and failing to appreciate their duty of safeguarding policy holders against adverse claims after being compliant with all the statutory requirements.

- 5) A declaration be and is hereby issued that the directive by the 3<sup>rd</sup> Respondent of capping the maximum compensation at Kshs. 250,000/= violates the petitioners right to legitimate expectation of being insured under the Insurance Act and violates Articles 10(2) (a), 27, 28, 47, 48 and 50(1) of the Constitution and is therefore null and void.
  - 6) A declaration be and is hereby issued that due to the failure of the 1<sup>st</sup> Respondent to ensure that insurance companies are compliant and the rights of policy holders are safeguarded, they should be made to absolve the Petitioner from the liability to pay the decretal sum in Eldoret Civil Suit E941 of 2022 Paul Kiprotich Choge vs. Simon Kimeli Kiptanui.
  - 7) An order of permanent injunction be issued prohibiting the Interested Party from executing the judgement in Eldoret Civil Suit E941 of 2022 against the Petitioner.
2. The Application is expressed to be brought under **Order 40, Rule 4 of the Civil Procedure Rules**. It is premised on the grounds set out thereon and the contents of the Supporting Affidavit sworn by the Applicant, **Simon Kimeli Kiptanui** on the same date.
  3. The Applicant deposed that vide a Judgment delivered on 17<sup>th</sup> October 2024, in **Eldoret Magistrate Court Civil Suit No. E941 of 2022**, judgment was entered against him for a sum of Kshs. 1,326,732 for injuries sustained in a

road traffic accident involving a motor vehicle owned by him wherein the Interested Party herein sustained bodily injuries.

4. The Applicant further deposed that the court in its judgement apportioned liability at the ratio of 60:40 based on its conclusion that he was vicariously liable for the actions of his driver and liability against the Interested Party was apportioned at 40%. That after the delivery of the judgment, he was served with an Application by the Interested Party's dated 12<sup>th</sup> November 2024 seeking to execute the decree by way warrants of attachment of his property issued to Seventy Seven Auctioneers.
5. The Applicant maintained that he is insured by Invesco Assurance Company which regarding PSV Matatus, covers limited Loss or damage to the insured vehicle, liability to third parties arising out of accidental death or bodily injury, and third-party property damage. That on 14<sup>th</sup> August 2024, Invesco Assurance Company Limited was placed under Statutory Management. Policyholders Compensation Fund(PCF) was established under **Section 179 of the Insurance Act (CAP 487)** and operationalized through **Legal Notice No.105 of 2004** for the primary purpose of providing compensation to policyholders and claimants of an insurer that has been placed under Statutory Management.
6. That as a member of Invesco Assurance Company which was placed under statutory management, he ought to have been protected by the Policyholders Compensation Fund (PCF) against any interference or attachment of his personal property and that the Policy Holders Compensation Fund has the responsibility to cater for liabilities of insurance companies that have been wound up emanating from its policyholders. That however, the PCF have

capped their compensation at Kshs. 250,000/= leaving the bulk of the decretal sum for Applicant to grapple with as regards its payment.

7. The Applicant further deposed that as a state corporation under the National Treasury, the 3<sup>rd</sup> respondent is duty-bound to ensure that the Constitution is fully respected and promoted in all its operations and that no right in the Bill of Rights is violated or threatened on compensation matters. That if the 3<sup>rd</sup> Respondent fails to intervene by compensating the Interested Party the full amount in the judgment, it will be promoting the direct violation of the Applicant's right to property and protection of the same enshrined under **Article 40 of the Constitution.**
8. In conclusion, the Applicant urged that unless the court intervenes and issues appropriate orders, the 3<sup>rd</sup> Respondent may fail to compensate the Interested Party who will end up attaching the Applicant's property which will be greatly detrimental.

### **Replying Affidavit**

9. The application is opposed by the Interested Party vide his Replying Affidavit dated 15<sup>th</sup> April 2025. He deposed that he was the claimant in the lower court suit being **MCCC No. E941 of 2022** and that he has a valid judgment of the trial Court in a suit that he filed in the said court seeking damages for compensation for injuries sustained in a road traffic accident that occurred on 4<sup>th</sup> July 2022 involving him and motor vehicle registration number KBC 181Z, a Toyota Hiace Matatu lawfully owned and insured by the Applicant. That after a full trial, the Honorable Court entered judgment in his favor on 17<sup>th</sup> October 2024 for the sum of Kshs. 1,326,732/= together with costs and interest.

10. The Interested Party deposed that the Petitioner has not challenged the said judgment by way of an appeal or review to date and so the same remains valid, lawful, and enforceable and that the same ought therefore and should be honored in full by the Applicant.
11. The Interested Party further deposed that upon failure by the petitioner to satisfy the judgment, he lawfully applied for and obtained warrants of attachment against his movable property in execution of the said judgment, as permitted under the **Civil Procedure Act and Rules**. He added that while he is aware that Invesco Assurance Company Limited was placed under statutory management and that the Policyholders Compensation Fund (PCF) issued a public notice on or around 3<sup>rd</sup> December 2024 inviting claimants to lodge claims, the PCF is only mandated to pay up to a maximum of Kshs. 250,000/=
12. That even if he were to lodge a claim with PCF, which he does not object to doing, the said fund would only settle a small fraction of the decretal sum at Kshs. 250,000/= leaving an outstanding balance of Kshs. 1,076,732, which then will remain lawfully due and owing from the petitioner. The Interested Party therefore urged that in the circumstances, execution against the petitioner personally for the balance is not only legal but just and equitable, as the PCF is not liable to settle the entire judgment sum.
13. The Interested party contended that the petitioner cannot use the existence of a statutory fund that only partially compensates victims to unjustly shield himself from the consequences of a lawful judgment. He maintained that this would amount to unjust enrichment and a violation of my constitutional

right to access justice and to enjoy the fruits of a valid court judgment and that the application for interim orders of stay and a permanent injunction is devoid of merit, malicious, and an abuse of the court process, aimed at frustrating lawful execution.

**14.**The Interested Party further deposed that the orders sought in the application, including a prayer for a permanent injunction, are misconceived, premature, and, untenable at this stage. He added that it is trite law that permanent injunctions can only be granted upon full hearing and determination of a petition, and not at the interlocutory stage through an application.

**15.**The Interested Party maintained that no constitutional right of the petitioner has been violated by his actions in seeking to enforce the judgment of the subordinate court and that on the contrary, the attempt to bar him from executing the decree violates his rights under **Article 48 (access to justice)** and **Article 50 (right to a fair hearing) of the Constitution** and that the orders sought by the Petitioner if granted would result in grave injustice and prejudice to him as a lawful judgment creditor.

**16.**None of the Respondents filed any responses to the Application either by way of A Replying Affidavit, Grounds of Objection or a Preliminary Objection.

### **Submissions**

**17.**The court directed that the Application be canvassed by way of written submissions. However, upon my perusal of the court record, I noted that none of the parties filed any submissions with respect to the Notice of

Motion the subject of this Ruling. The Submissions that were filed by the Petitioner and the Interested party are clearly marked as being with respect of the main Petition. The court also notes that the issues therein raised and submitted upon are specific to the constitutional issues raised in the main Petition and that there are no aspects of both submissions that relate to the interim orders sought in the Application. The court will therefore treat them as such. In that regard, there are no submissions for the court to summarize and it will therefore proceed to the determination of the case based on the relevant Statute and Case Law.

### **Determination**

**18.**The above said relating to the submissions filed, I must mention from the onset that save prayers (2) and (7) of the Notice of Motion, I note that the Petitioner/Applicant in the instant Application has sought for array of orders which upon my perusal are orders which final in nature and can only issue after the petition is heard and determined because issuing them at this interim stage will amount to making definitive and/or final findings on the main Petition at this interlocutory stage. This being the case then, even as the court also note that the Applicant does also not state what it is that he seeks that the court pends by the granting of the prayer (2) of his Application, it will nonetheless deal with the orders sought prayers (2) and (7) only.

**19.**The principles guiding the grant of a stay of execution are well settled. These principles are provided under **Order 42 Rule 6(2)** of the **Civil Procedure Rules** as follows:

**No order for stay of execution shall be made under sub rule (1) unless—**

**(a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay; and**

**(b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant**

**20.** The three parameters that a party seeking stay of execution is required to demonstrate under this provision are that;

- a) If the stay is not granted, substantial loss may result to the Applicant**
- b) That the Application has been made without unreasonable delay**
- c) That the Applicant is ready to deposit security for the due performance of the decree.**

**21.** The factors to consider in an Application for stay of execution are set out in the Court of Appeal decision in **Butt v Rent Restriction Tribunal [1982] KLR 417**, where the court held as follows: -

- 1) The power of the Court to grant or refuse an Application for a stay of execution is a discretionary power. The**

discretion should be exercised in such a way as not to prevent an appeal.

- 2) **The general principle in 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.**
- 3) **A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.**
- 4) **The Court in exercising its discretion whether to grant [or] refuse an Application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the Appellant had an undoubted right of appeal.**
- 5) **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 for costs as ordered will cause the order for stay of execution to lapse.**

22. On substantial loss, the Court of Appeal in the case of **Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) KAR 1018** where the court pronounced itself to the effect that:

**“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”**

23. Further, Ogola, J in **Tropical Commodities Suppliers Ltd & Others vs. International Credit Bank Ltd (in liquidation) [2004] 2 EA 331 (Supra)** stated that:

**“Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal.’**

24. On undue delay, the Court of Appeal sitting in Meru in Civil Appeal No. 45 of 2015 **M'ndaka Mbiuki v James Mbaabu Mugwiria [2016] eKLR** held that;

**“This ground is normally easy to determine and is usually straight forward. Although there is no exact measure as to what amounts to unreasonable delay, it will not be difficult to discern inordinate**

**delay when it occurs. It must be such delay that goes beyond acceptable limits given the nature of the act to be performed."**

**25.**On the deposit of security, in the case of **Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd [2019] eKLR**, the court observed thus:

**"... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower Court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails... Further, order 42 should be seen from the point of view that a debt is already owed and due for payment.... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that Courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the Applicant but for the Court to determine."**

26. In the instant case, in light of the omission and particularly by the by the Applicant to submit on the provisions of the law regarding an order of stay of execution as provided under Order 42 Rule 6 of the Civil Procedure Rule as a consequence of which he has failed to demonstrate that he has met the conditions therein set out, it is my finding that the Applicant has not at all satisfied the court that the orders of stay of execution as sought in prayer (2) of his Application are merited.

27. Further, in Prayer (7), the Petitioner has also sought for an order of a permanent injunction as already herein summarized. In **Kenya Power & Lighting Co. Limited v Sheriff Molana Habib** [2018] eKLR, the Court discussed conditions under which a permanent injunction may be granted as follows: -

**“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.**

**A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to**

**protect the subject matter of the suit as the court hears the parties.”**

**28.**From the above decision, it is clear that permanent injunctions rarely d issue at the interlocutory stage of proceedings unless there are very cogent and very good reasons advanced by the party so seeking such orders. In this case, the court finds that no such reasons have been advanced by the applicant to warrant the issuance of an order of permanent injunction at this interlocutory stage of the proceedings.

**29.**The upshot of my above findings is that the orders sought are not merited for the reasons given and the Applicant’s Application is therefore dismissed. Since both Counsel for the parties missed the point in their submissions at this interlocutory stage, the court orders that the costs be in the cause. of the parties have been at all helpful to the court at this interlocutory stage, the costs shall be in Going by the by the findings of the Court, the order cannot issue at this interim stage.

**Read dated and Signed at ELDORET on 20<sup>th</sup> February 2026**

**E. OMINDE  
JUDGE**