



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

COUNTY COURT NAME: MAKUENI HIGH COURT

CASE NUMBER: HCCC/2/2019

GEMINIA INSURANCE COMPANY LIMITED VS SIMON MWANGI WARUNGI

RULING

REPUBLIC OF KENYA
IN THE HIGH COURT AT
MAKUENI CIVIL SUIT NO. 2
OF 2019

GEMINIA INSURANCE CO. LTD.... PLAINTIFF/RESPONDENT

-VERSUS-

SIMON MWANGI WARUNGI.....DEFENDANT/APPLICANT

RULING

Introduction

1. The Application for determination is dated 20/08/2025 and was filed under certificate of urgency. It is brought under Order 63 (E) Rule 6, Order 50 Rule 6 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act (CPA) and all other enabling provisions of the law. It seeks the following orders;

a) *Spent.*



b) *Spent*

c) **THAT** upon hearing this Application *inter-partes*, there be a stay of execution of the lower court's judgment in Tawa SRMCC No. 061 of 2019 pending the hearing and determination of this suit.

d) **THAT** the costs of this Application be provided for.

The Application

2. The Application is supported by the grounds on its face and the Affidavit of Simon Mwangi Waruingi sworn on the same day. I have noted that paragraphs 1 -12 of the supporting affidavit are missing.
3. The gist of the Application is that on 05/06/2025, the lower court decreed as against the Defendant, kshs 313,000/= payable as damages and costs in the suit arising from the accident of 17/02/2017 and which accident the Plaintiff (*Insurer*) seeks declaratory prayers in this suit. That, the delay in hearing and determining this suit has been occasioned by the Plaintiff and the said Tawa suit has been concluded and execution has been set in motion against the Applicant.
4. That the Applicant has indeed presented to the Insurer the said decree for purposes of settlement to avert imminent execution but the insurer has remained completely unmoved, which inertia has now placed the Applicant in harms way. That, the Applicant will suffer substantial loss if the orders sought are not granted whereas the insurer will suffer no prejudice at all. The trial court judgment, decree and correspondence between the parties are exhibited as

SMW.

5. Further, the Applicant undertakes to offer security as and when called upon by the court to do so.

The Response

6. The Application is opposed through the Replying Affidavit of Wilson

Mwau Makau sworn on 10/9/2025. He deponed that he is the Plaintiff in the trial court and stay orders were issued against him on 25/08/2025 hence he is competent to swear this affidavit. That, according to advice given by his advocates, the Application dated 20/08/2025 was brought to this court by withholding material information that would have persuaded the court not to issue the orders and the same is a furtherance of the Defendant's indolence and delaying tactics in settling the claim.

7. That, he has never been a party to the suit before this court and was never aware of the issues between the parties and while the Defendant was at all times aware of the existence of the suit, he has never moved the court to have him (*Wilson Mwau*) enjoined as an interested party. That, the Defendant waited until the suit in the lower court was fully heard, decree issued and notified of execution to rush to this court for the undeserving orders. That, it goes against the simplest tenets of the law to seek orders against him while he is not a party to this suit.

8. That, the suit before this court has been filed by the Defendant's insurer seeking to be discharged from satisfying any claim, in relation to the trial court claim, for breach of policy conditions but there exists no suit by the Defendant seeking to enforce his rights, if any, against the insurer hence any orders of stay in this suit will serve no purpose at all.

9. That, by his own admission, the Defendant admits to his own indolence in the following reasons which are clearly delaying tactics;



- a) This suit and the one in the lower court have been in court since 2019 and while aware that there was possibility of a judgment against him, he never moved this superior court for appropriate and deserving orders seeking to enforce the insurance policy terms and/or stay of proceedings in the lower court.

- b) The judgment in the lower court was delivered in full participation of the Defendant and his advocate on 05/06/2025 and despite several reminders, the Defendant did not move the court earlier.
 - c) The Defendant cannot be heard to blame the Plaintiff for the delay in this suit because from his own annexures, he at one point did not issue sufficient instructions to his advocate prompting him to seek to cease acting.
 - d) The Defendant had also filed an appeal challenging a ruling of the trial court that had disallowed his application for adjournment being Makueni HCCA No. 0010 of 2020 (Wariungi Mwangi Simon -vs- Wilson Mwau Makau) which appeal was compromised by consent to expedite the lower court suit. Copies of the Memorandum of Appeal & consent are exhibited as **WMM I & II**.
10. The Application was canvassed through written submissions.

The Applicant's Submissions

- 11.** The issue for determination was stated to be; **Whether this Honourable Court should exercise its inherent jurisdiction under Order 63(e) and Section 3A of the Civil Procedure Act to stay execution of the judgment in Tawa MCC No. 61 of 2019 pending the determination of this declaratory suit.**
12. Reference was made to Order 63(e) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for the submission that the court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the

process of the court. That, the court has wide discretion to preserve the subject matter of proceedings pending the determination of issues before it, particularly where execution of a decree in related proceedings may

render its eventual decision nugatory.

13. It was submitted that the central question in this suit is whether the insurer is liable to indemnify the Defendant/Applicant in respect of the decree arising from Tawa MCC No. 61 of 2019. That, if execution proceeds before that issue is determined, and the insurer later fails in establishing non-liability, the Defendant/Applicant -the insured- will have been compelled to personally satisfy a judgment that should properly fall within the policy's cover. That, such a scenario would render the determination of this declaratory suit purely academic and occasion grave injustice. Reliance was placed on **Kenya Commercial Bank Ltd -vs- Suntra Investment Bank Ltd [2015] eKLR**, where the Court observed that;

"The inherent jurisdiction of the court exists to enable it to make orders necessary to meet the ends of justice and prevent the abuse of its process."

14. Further reliance was placed on **APA Insurance Co. Ltd -vs- George Masele [2014] eKLR** where the court held that;

"Where liability to indemnify is yet to be determined, execution against the insured would render the proceedings in the declaratory suit nugatory."

15. It was submitted that the Application has been made timeously and in good faith in that, the Applicant moved this Court immediately upon learning of imminent execution following the Tawa judgment. That, there has been no delay or laches. That, the gesture demonstrates utmost good faith and ensures that the decree-holder's interests remain fully secured during the pendency of this suit.



16. It was submitted that no prejudice will be suffered by any party. That, the insurer's position will remain safeguarded and the Tawa decree-holder's interest will be protected by the proposed deposit. On the other hand, it was submitted that, if stay is refused

and the Defendant/Applicant is forced to satisfy the decree and the Court subsequently holds that the insurer is bound to indemnify him, the Applicant will have suffered irreparable loss and the declaratory proceedings rendered moot.

17. It was submitted that the Replying Affidavit sworn by Wilson Mwau Makau is incompetent in that he is a stranger to this suit and lacks *locus standi* to participate herein, having not been formally enjoined. That, under Order 1 Rule 10(2) of the Civil Procedure Rules, only the Court may add a person as a party upon application and proof that their presence is necessary for the effective adjudication of the issues. That, the said party has not sought or obtained such leave and therefore cannot lawfully file pleadings or submissions in these proceedings. Reliance was placed on **Trusted Society of Human Rights Alliance -vs- Mumo Matemu & 5 Others [2014] eKLR** where the Court of Appeal stated;

“A person can only be heard in a matter if they are properly joined as a party. Until then, they are strangers to the proceedings.”

18. It was submitted that the Replying Affidavit should be struck out and contended that, even if it is considered, the alleged prejudice raised is merely the delay attendant to this suit, which is not prejudice in law particularly where, as here, the decretal amount can be safely deposited in court or in a joint account pending determination.

Submissions by Mwau Makau (Plaintiff in Trial Court)

19. It was submitted that orders cannot issue against a non-party to the suit. That, he (*Mwau Makau*) is not a party to this suit and the Defendant did not seek to enjoin him. That, parties are bound by their



pleadings from which the orders flow. That, the decree in the trial court was issued in favor of Mwau Makau and the same is sought to be stayed in the current proceedings without his participation.

20. It was submitted that the orders of stay would be in vain as the Defendant has not filed a counter claim or sought any prayer against the insurer seeking to compel it to satisfy the decree. That, with or without the success of the suit before this court, the Defendant would eventually be required to satisfy the decree and thereafter seek indemnity from the insurer.
21. It was submitted that there is an admission in the Defendant's submissions to the effect that a court cannot do anything for or against a party that is not properly joined in proceedings.
22. It was submitted that if the court finds the Application remotely merited, it should balance and safeguard the interests of the Plaintiff in the trial court as he has a valid and payable decree. That this court should order the Defendant to deposit the entire decretal sum of ksh 324, 412/= as at 10/07/2025 exclusive of further interest.
23. Having looked at the Application, Response and rival submissions, the only issue for determination is whether the same is merited.

Analysis & Determination

24. According to Order 42 Rule 6 of the Civil Procedure Rules, the conditions which should guide the Court in determining whether to grant stay pending appeal are; whether substantial loss will occur if stay is not granted, whether the application has been filed without unreasonable delay and furnishing security for the due performance of the decree.
25. The trial court case (*the primary suit*), Tawa

SPMCC No.61 of 2019, was between Wilson Mwau Makau and Waruingi Mwangi Simon *alias* Simon Mwangi as Plaintiff and Defendant respectively. The cause of action arose from a road traffic accident which occurred on 17/02/2017 involving the Defendant's motor vehicle registration No. KBW 307C (*the accident motor vehicle*). The judgment therein was delivered on 05/06/2025 in favor of the Wilson

Mwau Makau and the resultant decretal award was kshs 313,000/=.

26. In the declaratory suit herein, which was filed simultaneously with the primary suit, the Insurance company admitted that it had insured the accident motor vehicle but sought to avoid all claims arising from the accident on grounds of breach of policy. That issue is still pending determination in this court. It is noteworthy that the insurance company has not prosecuted the suit.
27. The Plaintiff in the primary suit, Wilson Mwau Makau, is certainly an interested party in the suit before this court but he has not been formally joined. The applicant is the defendant in this suit and did not seek to have the Plaintiff in the primary suit joined in this suit.
28. The judgment in the primary suit was delivered on 05/06/2025 and the stay issued therein lapsed on 20/07/2025. The Application herein was filed on 20/08/2025 and the applicant was aware that he was seeking orders against a person who was not a party to the suit.
29. It is noteworthy that the plaintiff, the owner of this suit has not participated in these proceedings i.e the application for stay. The stay sought is not in a judgment against the plaintiff herein but against a person not a party to this suit.
30. Mr. Wilson Mwau Makau rightfully argued that any stay orders issued herein will be in vain as the Applicant has not sought any prayer against the insurer (plaintiff herein) seeking to compel it to satisfy the decree .
31. The plaintiff herein is obligated to settle the claim vide

- s. 10 of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405. The applicant ought to be pursuing the plaintiff respondent (the Insurer) to settle the claim.
32. In my view the application is misconceived and an abuse of the court process as it seeks to stay orders against a person who is not a party to the suit.
33. The application is without merit and the same is struck out accordingly with costs .

Dated, signed and delivered virtually (CTS) this 27th March 2026

Mumbua T Matheka
Judge

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SIGNED BY/FOR:
LADY JUSTICE MATHEKA, TERESIA MUMBUA

