Njoroge (Suing as the Administrator of the Estate of Benson Kinuthia Wanja) & another v Luxury Shuttle Tours & Travel Limited & another (Civil Appeal E060 of 2024) [2025] KEHC 1091 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1091 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL E060 OF 2024

EM MURIITHI, J

FEBRUARY 27, 2025

BETWEEN

TABITHA WACERA NJOROGE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF BENSON KINUTHIA WANJA) ..... 1ST APPELLANT

JANE WANJA KINUTHIA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF BENSON KINUTHIA WANJA) ..... 2ND APPELLANT

AND

LUXURY SHUTTLE TOURS & TRAVEL LIMITED ..... 1ST RESPONDENT

CHARLES MWITI KINYUA ..... 2ND RESPONDENT

JUDGMENT

1. The appellant herein being dissatisfied with the ruling and orders of the SPM Court at Wanguru in Civil Suit No. E057 of 2020 delivered on 14th May, 2024 appeals on the following grounds:

    1. That the learned trial Magistrate erred in law and in fact in applying the wrong and incorrect legal provisions being Order 42 Rule 6 on the stay pending appeal to determine the application yet there was no pending appeal as required under the aforementioned order.

    2. That the Learned Trial Magistrate erred in law and in fact in allowing the application dated 5th March 2024 without providing a time limit within which the Defendants should prosecute and conclude the hearing and determination of Wanguru MCC No. 24 of 2024 Luxury Shuttle Tours and Travels Limited vs. Invesco Assurance Company Limited.

    3. That the Learned Trial Magistrate erred in law and in fact in not ordering Kshs 1,440,627/= be paid to the Appellant despite holding that the insurer is liable to pay only KES 3,000,000/=

as per the *Insurance (Motor Vehicles Third Party Risks) Act* and there is no appeal challenging the entire decretal amount of KES 4,440,627/=.

4. That the Learned Trial Magistrate erred in law in relying on the *Insurance Act* (Cap 487) instead of the *Insurance (Motor Vehicles Third Party Risks) Act* Cap 405 to make her determination.

5. That the Learned Trial Magistrate erred in law and in fact by misinterpreting Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* Cap 405 which places an obligation on the insurer to pay the decretal amount but does not provide for a stay of execution against the insured by the third party.

Brief background

2. The ruling delivered on 14th May, 2024 stayed execution of a decree dated 28th February 2024 pending the hearing and determination of a declaratory suit filed by the Respondents against their insurers, Invesco Assurance Company Limited. The declaratory suit Wanguru SPMCC No. 24 of 20224, Luxury Shuttle Tours & Travel Limited vs. Invesco Assurance Company Limited was filed on 19th March 2024 and the appellants are not a party to the suit. This suit was filed a few days after the decree was issued.

3. The declaratory suit seeks to have the insurer pay the decretal amount of Kshs. 4,133,275/=, costs and interest which all totalled to KES 4,440,627/= as of 28% February 2024. The decree has accrued interest of KES 518,073/= as of 28th December 2024 bringing the total amount to KES 4,958,700/= as of 28 December 2024.

4. The appellants are wife and mother to one Benson Kinuthia Wanja who was fatally injured in a road traffic accident caused by the vehicle owned by the first respondent and driven by the second respondent. In addition to the two appellants, the deceased left behind two young sons who were deprived of their father as a result of the negligence of the Respondents. The appellants filed a road traffic accident compensation case where judgment was entered in their favour. It is important to note that the judgment and the decree awarding the appellants KES 4,440,627/= have not been challenged or appealed against. What has been challenged is the execution process where the Respondents are seeking to have their insurer bear the loss.

Appellant's submissions

Whether the trial court erred in applying the wrong legal Provisions Being Order 42 Rule 6

5. The Learned Trial Magistrate premised her ruling on Order 42, Rule 6 on Stay Pending Appeal and clearly stated as such on page 2 and 3 of the ruling. She confused the application before her with an application for stay pending appeal. There was no appeal on this matter. From that point she went completely off tangent and misapplied her mind on the matter. She even proceeded to order for security to be deposited with the court. It is our submission that the Learned Trial Magistrate erred in law and in fact in applying the wrong and incorrect provisions on stay of execution pending appeals to determine the application yet there was no appeal in the matter. By relying on the wrong law, the magistrate arrived at a wrong and unjust conclusion

Time limit for prosecution of the declaratory suit

6. The appellants submit that the Learned Trial Magistrate erred in law and in fact in allowing the application dated 5th March, 2024 without providing a time limit for them to conclude the declaratory suit, failure to which execution should ensue. This action by the learned magistrate goes against a

plethora of court decisions which were binding on her court. It was our submission that the Learned Trial Magistrate erred in law and in fact in allowing the application dated 5th March 2024 without providing a time limit for them to conclude the declaratory suit, failure to which execution should ensue.

Whether the trial court misinterpreted Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405

7. The appellant submits the Learned Trial Magistrate erred in law and in fact by failing to recognize that that the statutory right to seek a declaration against the insurer by the insured does not and cannot bar a decree holder from executing his/her decree against the judgement debtor who is the insured.

8. In Dolk Limited v Invesco Assurance Company Limited & 5 Others [2018] eKLR and in Muthuri Ntara & Another v Francis Mworia Igweta [2016]eKLR the court in both instances stated that despite the fact that section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act provides for the mandatory satisfaction of a judgement of any sum payable to its insured under a policy, the section does not provide for a stay of execution against the insured by the third party and further that the statutory right to seek a declaration against the insurer by the insured does not and cannot bar a decree holder. from executing his/her decree against the judgement debtor who is the insured.... In the circumstances, I find that the instant application is not merited. I dismiss it with costs to the interested parties.

Respondent's Submissions

Whether the trial court erred in applying the wrong legal Provisions being Order 42 Rule 6

9. Although the Appellants contend the trial court erroneously cited Order 42 Rule 6, it is beyond dispute that the court retained inherent discretion under Order 22 Rule 22 of the Civil Procedure Rules, as well as Section 3A of the *Civil Procedure Act*, to grant a stay where executing the decree immediately would cause substantial injustice.

10. The respondent submits that courts regularly invoke similar principles—such as "substantial loss" and the requirement of providing "security'—when ruling on stays, irrespective of the procedural posture (whether an appeal is pending or a declaratory suit is in progress).

Statutory Management Does Not Extinguish Liability

11. Insurer's placement under statutory management or liquidation does not absolve it of duly decreed liabilities. Instead, it affects when and how the debts are paid, often involving the Policyholders Compensation Fund (PCF).

12. The conclusive declaratory decree remains valid and enforceable, meaning the insurer, through its statutory manager, retains the primary obligation to satisfy the decree.

Issues

13. The Issues for determination are:

    a. Whether the trial court erred in applying the wrong legal Provisions being Order 42 Rule 6.

    b. Whether the trial court misinterpreted Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405

    c. Whether Statutory Management of the Insurer negates its liability or renders the declaratory process nugatory.

Analysis

14. Whether the trial court erred in applying the wrong legal Provisions being Order 42 Rule 6

15. The appellant submits that the Learned Trial Magistrate premised her ruling on Order 42, Rule 6 on Stay Pending Appeal and yet there was no appeal on the matter.

16. [Order 42, rule 6.] of the Civil Procedure Rules provides as follows:

    1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

    2. No order for stay of execution shall be made under subrule (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.

17. In the case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, it was said that: "No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself. does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.

18. The Appellants submit that the Trial Court erred in relying on this provision as the declaratory suit herein is not appeal and should not be sufficient cause to warrant the stay of execution and deprive the appellants of the fruits of their judgment.

19. The respondent submits that even if the ruling made reference to Order 42 Rule 6, the underlying rationale—preventing irreparable loss to the Respondents while an insurance indemnity question was resolved—is well within the trial court's discretionary remit.

20. In Machira t/a Machira & Co Advocates v. East African Standard (No. 2) [2002] eKLR, Hon. Justice R.C.N. Kuloba emphasized that proving substantial loss is critical in seeking a stay, and deposit of security is a valid protective measure. The Respondents precisely satisfied these criteria.

21. We agree with the respondent's submissions that the trial court's decision reflects a sound exercise of discretion to prevent injustice, and any minor mislabelling of the provision of Order 42 as Order 22 Rule 22 does not invalidate the purpose and correctness of the stay order.

Time limit for prosecution of the declaratory suit

22. The appellant submit that the Trial Magistrate erred in law and in fact in allowing the application dated 5th March, 2024 without providing a time limit for them to conclude the declaratory suit, failure to which execution should ensue.

23. Andrew Linge Mutua v Geminia Insurance Company Limited; Zipporah Mwende Mutua (Interested Party) [2021] eKLR where the learned G V Odunga, J. (as he then was) granted stay for a limited period of 60 days as follows in a similar situation to allow the conclusion of a declaratory suit:

24. 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.

25. The appellant submits that the primary duty of settling the decree falls on the Respondents and not their insurer.

26. The time limit serves to ensure that the judgment debtor does not enjoy an open-ended perpetual stay of execution under the pretext of a declaratory suit. Court should give a time limit for the declaratory suit with a view to ensure that the decree-holder is not denied the fruits of his judgment in perpetuity.

27. The trial court's decision is prejudicial to the applicant as it allows the respondent to enjoy stay of execution as long as he prosecutes the declaratory suit.

    Whether the trial court misinterpreted Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405

28. Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, Laws of Kenya (the Act) provides as hereunder:

> If, after a policy of insurance has been effected judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy. the insurer shall. subject to the provisions of this section pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgements.

29. The appellant submits that section cannot be interpreted in any way to mean the obligations placed on the part of the insurer to satisfy the decretal sum amounts to stay of execution of a decree against the insured.

30. In the case of Odhiambo v Monarch Insarance Co Ltd; Senge & another (Interested Parties) (Civil Case E002 of 2022) [2022] KEHC 18610 (KLR) (23 November 2022) (Ruling) where the court held that the law does not provide for a stay of execution where the insurer has failed and that a declaratory suit cannot be a bar to execution.

31. In Daniel Mutua Musyoki vs Amaco Insurance Company Ltd & Another (2023) eKLR, this court dealt with a similar application:

> The primary duty of settling the decree falls squarely on the Applicant. In the event the 1st Respondent as his insurer fails to satisfy the decree, the Applicant will still be called upon to satisfy the same. Nothing prevents the Applicant from settling the decretal sum and then suing the Respondent for compensation or reimbursement.

32. In the respectful view of this court, the provisions of section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act, is a cover for the comfort of the insured and not a bar to execution of a valid decree of court. The bar under section 5 of the At is similarly an arrangement that the insurer is compelled to cover upto a certain amount, which could be contracted to a higher figure, of liability incurred by its insured.

33. The primary responsibility of settling a decree lies with the party against whom it is issued. Dragging the Interested Party/ insurer to this suit is improper.

Whether Statutory Management of the Insurer Negates Its Liability or Renders the Declaratory Process Nugatory

34. On 14th August 2024, Invesco Assurance was placed under statutory management. However, Section 67C of the *Insurance Act* (Cap. 487) merely vests control of the insurer's assets and operations in a manager; it does net annul the insurer's debts or obligations.

35. I respectfully agree with G.V. Odunga, J (as he then was) in Ndonye v. Invesco Assurance Co. Ltd [2022] KEHC 416, a moratorium on payments does not abolish an insurer's liability; it merely postpones or coordinates it within the statutory management framework.

36. The appellant submits that the declaratory suit is of little or no value as the same cannot proceed against an insurer whose management has been taken over by the Policy Holders Compensation Fund (PCF). Furthermore, the maximum the Respondents can recover from the PCF/Invesco is only KES 250,000 against the decree of 4,440, 627/= which continues to accrue interest. The decree has accrued interest of KES 518,073/= until 28th December 2024 bringing the total amount to KES 4,958,700/= as of 28th December 2024.

37. The court is invited to take judicial notice of the fact that the declaratory suit has been rendered of little or no value after the insurer was put under statutory management on 14th of August 2024.

38. The trial court in the impugned ruling granted stay of execution upon terms as follows:

> i. Having found that the application has merit to the extent that the defendant in the declaratory suit has the statutory duty to settle claims pursuant to section 10(1) (2) of the *Insurance Act*, section 5 thereof caps he amount payable by the Insurance to 3 million. The decree herein is for Ksh. 4.440,627 to mean that the applicant is bound to settle Ksh.1,440,627/=. I will allow the application on condition that the applicant furnishes security for the performance of the decree by depositing half of the amount totalling Ksh.720,313.5/= in Court within 30 days from eh date of this ruling failure[to] which the order will lapse automatically."

39. There is no appeal from the judgment of the court so the stay could only have been given pending the determination of the declaratory suit, which did not, in the understanding of the Court affect the payment of Ksh.1,440,627.

40. The Court considers that even in deference of the trial court's argument, the existence of the declaratory suit could not justify the stay of execution for the amount over and above the limit of Kshs.3,000,000/- payable by the Insurance company under section 5 of the *Insurance (Motor Vehicles Third Party Risks) Act*. The Insurance would never be called upon to pay the amount in excess of Kshs.3,000,000/-, and therefore the suit against the Insurance cannot provide a cover for the amount. The trial court fell into error when granting the application for stay of execution on the basis of declaratory suit.

41. This Court has determined that the declaratory suit does not take away liability from the primary debtor and the insurer herein being under moratorium, the duty to meet the decree of the court remains with the respondent.

42. There was no appeal in this case and, consequently, allowing the stay of execution to be sustained upto the outcome of the declaratory suit will only deny the appellant the fruits of his judgment.

Orders

43. Accordingly, for the reasons set out above, the court finds that the appeal has merit and the order of the trial court staying the execution of the decree on condition of deposit of Ksh.720,313.50 is set aside.

44. The Respondent shall pay to the Appellant the full sum of Ksh.4,440,627 and interest thereon from date of judgment and costs.

45. The respondent shall pay the costs of the appeal to the appellant.

Order accordingly.

DATED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Macharia for the Appellant.

Ms. Munene for the Respondent.