



Mwita v Trident Insurance Company Limited; Koech (Interested Party) (Civil Suit E020 of 2025) [2025] KEHC 5086 (KLR) (Civ) (30 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5086 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT E020 OF 2025**

**SN MUTUKU, J
APRIL 30, 2025**

BETWEEN

DANIEL MWITA MWITA PLAINTIFF

AND

TRIDENT INSURANCE COMPANY LIMITED DEFENDANT

AND

NICHOLAS KIPLAGAT KOECH INTERESTED PARTY

RULING

The Notice of Motion

1. Under determination is the Notice of Motion dated 3.02.2025 (the Application) brought by Daniel Mwita Mwita (the Applicant). The Application is anchored on various provisions of the law as shown on the face of it and seeks the following orders:
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of this suit, this Honourable Court do issue orders staying execution of the Decree issued by the Court on 8th October 2024, arising from the judgment entered at the Milimani Small Claims Court in SCCC/E4437/2024 (Nicholas Kiplagat Koech Versus Daniel Mwita Mwita).
 4. That pending the hearing and determination of this Application and main suit, this Honourable Court do issue orders staying the proceedings at the Milimani Small Claims Court in SCCC/E4437/2024 (Nicholas Kiplagat Koech Versus Daniel Mwita Mwita).



5. That pending the hearing and determination of the main suit, an order be issued directing the Defendant/Respondent to deposit with the Court the decretal sum of Kshs. 603,189.72.
 6. That this Honourable Court be pleased to make such further orders as to meet the ends of justice necessitated by the circumstances and reasons herein.
 7. That the costs of this Application be provided for.
2. The Application is supported by the grounds set out on its face and in the Supporting Affidavit sworn by the Applicant on 3rd February 2024. The Applicant has stated that he was at all material times the registered owner of the motor vehicle registration number KCW 987L (the subject motor vehicle) insured by Trident Insurance Company Limited (hereafter the Defendant) vide Policy No. 020/070/1/787396/2023 (the Policy) effective from 4.12.2023 to 1.10.2024; that sometime on or about 27.08.2024 the subject motor vehicle was involved in an accident along Ngong Road as a result of which Nicholas Kiplagat Koech (the Interested Party) sustained bodily injuries; that consequently, the Interested Party instituted Milimani SCCC No. E4437 of 2024 (Nicholas Kiplagat Koech v Daniel Mwita Mwita) (the primary suit) seeking various reliefs against the Applicant and that upon entry of judgment in the primary suit, the Interested Party has commenced execution proceedings against the Applicant.
 3. It is the Applicant's averments that he had previously notified the Defendant of the occurrence of the said accident and that the Defendant was equally served with a statutory notice in respect of the primary suit; that the Defendant thereafter instructed him to pay an excess sum of Kshs. 30,000/- to enable it take up the matter on his behalf, which he complied with; that nevertheless, the Defendant failed to honour its obligations, thereby resulting in entry of a default judgment against the Applicant on 8.10.2024.
 4. The Applicant has stated, further, that on 24.09.2024 the Defendant instructed the firm of Ong'anya Ombo & Co. Advocates to represent him in the primary suit, which firm entered appearance but failed to file an application to set aside the default judgment; that, consequently, on 14.11.2024 the Applicant was served with warrants of attachment and a proclamation notice; that he subsequently filed an application dated 15.11.2024 seeking to set aside the default judgment, which application was allowed by the lower court vide a ruling delivered on 19.12.2024, conditional upon the Applicant filing a statement of response and depositing the decretal sum of Kshs. 603,189.72 within 45 days thereof, failing which order would lapse and execution would proceed and that while the Applicant has complied with the first condition, he has been unable to deposit the decretal amount thereby resulting in lapse of the setting aside order.
 5. It is the Applicant's case that the Defendant has breached its obligations under the Policy, hence the present declaratory suit. That unless the orders sought herein are granted, the Applicant stands to suffer substantial loss resulting from the attachment of his goods, including the imminent sale of the subject motor vehicle. He urged that it would serve the interest of justice for the orders sought in the instant Application to be granted.

The Replying and Supplementary Affidavits

6. The Application is opposed by the Interested Party through his Replying Affidavit sworn on 18.02.2025 in which he has averred, inter alia, that the Applicant was at all material times aware of the existence of the primary suit and yet he did not defend it or demonstrate any active steps taken in defending the suit; that the Applicant has equally not established any viable grounds to warrant an order for a stay of proceedings in the primary suit; that the timelines set out in the aforementioned



ruling by the lower court have since lapsed and yet the Applicant did not comply with the condition requiring him to deposit the entire decretal amount in the primary suit.

7. The Interested Party has stated that the matters in issue in the present declaratory suit lie solely between the Applicant and the Defendant; that on his part, he is entitled to the decretal sum and should not be kept waiting during the pendency of the declaratory suit; that the Applicant is not entitled to any of the orders being sought in the instant application and that this court should exercise its discretionary powers by dismissing the this application with costs, for want of merit.
8. The Applicant filed a Supplementary Affidavit sworn on 14.03.2025 in which he has reiterated his earlier averments and added that he has since applied for default judgment to be entered against the Defendant in the present declaratory suit for its failure to enter appearance and/or file a statement of defence and that the Interested Party's interests will be protected.
9. The Applicant has made allegations against the advocate for the Interested Party and stated that the Interested Party was at all material times aware that the subject motor vehicle had been insured by the Defendant, but he instead chose to pursue a claim against the Applicant; that consequently, the Interested Party's claim ought to lie against the Defendant and that it is untenable for the Interested Party to state that the Applicant ought to have defended the primary suit and thereafter pursued the declaratory suit against the Defendant.

Submissions

10. The parties filed written submissions. The Applicant has anchored his submissions on the case of Alois Ochieng' Ndege v Explico Insurance Company Limited; Jane Wachuka Munene (Interested Party) [2022] KEHC 924 (KLR) in which the court granted an order for a stay of execution pending hearing and determination of a declaratory suit and submitted that the instant Application has been brought without an unreasonable delay and that the likelihood of substantial loss has been demonstrated.
11. On the question of provision of security, the Applicant argued that the same would not apply here, since he has shown his financial inability to settle the decretal sum awarded in the primary suit and that it would be unfair in any event, for him to be ordered to provide security when the Defendant is dutifully bound to satisfy the judgment in the primary suit. He relied on the case of Charles Makenzi Wambua v Africa Merchant Assurance Co. Ltd & another [2014] KEHC 891 (KLR) where the court reasoned thus:

“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.”

12. The Applicant has further cited Section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act, Chapter 405 Laws of Kenya which sets out the duty of an insurance company to satisfy judgments entered against its insured, in respect of third party claims and in line with the terms of the respective insurance policy agreement in place. On those grounds, the Applicant has urged this court to allow the Motion, as prayed.
13. In his submissions, the Interested Party has argued that Order 22, Rule 22 of the CPR under which the Application was brought, is inapplicable in this case, since no decree has been sent to this court for purposes of execution. He further submitted that Order 42, Rule 6 of the CPR under which the Motion was similarly brought, concerns itself with a stay of execution pending appeal; yet the present matter does not constitute an appeal, rather, a declaratory suit and therefore, this provision is also inapplicable here. He argued that, in any event, the Applicant failed to comply with the condition previously set by the lower court, requiring him to deposit the decretal sum in court and hence he is not entitled to the stay order sought.
14. The Interested Party referred to the earlier cited case of Alois Ochieng’ Ndege v Explico Insurance Company Limited; Jane Wachuka Munene (Interested Party) (supra) in which the court reasoned that the provision of security is a mandatory requirement for granting a stay of execution.
15. The Interested Party submitted that the present declaratory suit does not seek any orders against him and hence the stay order sought cannot apply. He relied on Kimani v Monarch Insurance Company Limited; Muigai (Interested Party) [2024] KEHC 8362 (KLR) in which the court, in dismissing an application fairly similar to the instant one, reasoned that while an insured is at liberty to file a declaratory suit against an insurance company in respect of a decree issued in a primary suit, the same does not bar the successful party in the primary suit from pursuing the decretal amount from the insured, the dispute between the two parties having already been determined.
16. On the subject of deposit of the decretal amount which also constitutes one of the orders sought in the instant Application, the Interested Party has argued that the primary obligation to settle the decree rests with the judgment debtor, in this case, the Applicant and that it therefore follows that the Applicant ought to settle the decretal sum herein and he can thereafter seek indemnity from the Defendant, by way of the present declaratory suit. In support of this argument, the Interested Party has cited inter alia, the case of Ndonye v Invesco Assurance Co. Ltd [2022] KEHC 416 (KLR) in which the court reiterated the primary obligation of a judgment debtor in settling the decree, even where his or her insurer has failed to satisfy the same. The Interested Party urged this court to dismiss this application with costs.
17. The Applicant filed further submissions in a rejoinder. He reiterated his earlier averments and added that the Defendant has not opposed the application and hence the orders sought herein ought to be granted, more particularly the order for deposit of the decretal amount. The Applicant has further contended that unless a stay of execution is granted, he stands to suffer substantial loss especially in respect of the subject motor vehicle, which he utilizes for income generation. The Applicant has further contended that he has diligently pursued the matter with the Defendant, in a bid to promote the interests of the Interested Party. He equally submitted that he remains keen on expediting the prosecution of the declaratory suit.
18. I have noted, from the record, that the Defendant/Respondent did not participate in the hearing of this application or file any documents in response thereto.



Analysis and Determination

19. I have considered the Application and the grounds in support of it. I have considered the Replying Affidavit in opposition and the parties' submissions and authorities cited.
20. The record is clear, and this is not disputed, that the Interested Party filed the primary suit against the Applicant. It is also not in dispute that default judgment was ultimately entered in favour of the Interested Party. It is apparent from the record that the subject motor vehicle in the primary suit belonged to the Applicant at all material times and is said to have been insured by the Defendant. It is also apparent from the record that following the judgment in the primary suit, the Applicant instituted the present declaratory suit against the Defendant, essentially seeking a declaratory order that the latter is obligated to satisfy the decree in the primary suit, by virtue of the Policy agreement entered into between the Applicant and the Defendant/Respondent.
21. The orders sought by the Applicant include an order for a stay of proceedings in the primary suit, pending hearing and determination of the declaratory suit before this court. The record, however, shows that parties did not canvass that prayer, besides, there is no evidence to indicate that there are any proceedings in the primary suit pending before the lower court to warrant a stay. In the absence of any evidence to that effect, I find that prayer 4 of the Application cannot issue and it automatically fails.
22. The Applicant also seeks an order for a stay of execution of the decree emanating from the primary suit, pending hearing and determination of the present declaratory suit.
23. Granting or declining to grant an order for stay is discretionary on the part of the court, which discretion ought to be exercised judicially. Order 42, Rule 6(2) of the CPR sets out the conditions to be met in order for a stay of execution pending appeal to be granted. However, the present matter does not concern an appeal and hence the above-referenced provision may not be applicable.
24. The Applicant has argued that he stands to suffer substantial loss unless the stay order sought is granted. The issue of substantial loss in any application for a stay of execution was aptly addressed by the Court of Appeal case in the renowned case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410 when it held that:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”
25. I have considered the positions of the Interested Party who is lawfully entitled to enjoy the fruits of his judgment and that of the Applicant who has pleaded substantial loss. Although the Applicant submitted that he stands to suffer the risk of being deprived of the subject motor vehicle which is a source of income and livelihood for him and his family, he did not tender any credible material to support these assertions. He equally did not tender any credible material to support the assertions that he is not a man of means and therefore unable to settle the decretal sum in any event.
26. I have noted different findings by courts in *Alois Ochieng' Ndege v Explico Insurance Company Limited*; *Jane Wachuka Munene (Interested Party)* [2022] KEHC 924 (KLR) and the case of *Charles Makenzi Wambua v Africa Merchant Assurance Co. Ltd & another* [2014] KEHC 891 (KLR), cited by the Applicant in his submissions. In these cases, the courts were inclined to grant a stay of execution pending hearing and determination of a declaratory suit. However, the court in the case of *Kimani v Monarch Insurance Company Limited, Muigai (Interested Party)* [2024] KEHC 8362 (KLR) cited in the submissions by the Interested Party, declined to grant a stay of execution. I am persuaded by the position taken in *Kimani v Monarch Insurance Company Limited; Muigai (Interested Party)*



(supra) that the primary duty of settling a decree lies with the judgment debtor and that the existence or pendency of a declaratory suit would in no way bar a decree holder from executing the decree as against the judgment debtor, even where such debtor is insured. In any event, nothing would prevent a judgment debtor from settling the decretal amount and thereafter seeking reimbursement from his or her insurer. A similar reasoning was adopted by the court in the case of *Ndonye v Invesco Assurance Co. Ltd* [2022] KEHC 416 (KLR) also cited in the submissions by the Interested Party, thus:

“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. After considering this issue, I hold the view that the Applicant has failed to persuade this court to grant him stay pending the hearing and determination of the main suit.
28. On the third and final order which seeks to have the Defendant compelled to deposit the decretal amount of Kshs. 603,189.72 pending determination of the declaratory suit, it is apparent that the Applicant is primarily basing this prayer on the averment that he is personally unable to deposit the same as well as the averment that the Defendant is dutifully bound to satisfy the decree under the Policy agreement.
29. Upon considering the above position, it is not in dispute that the declaratory suit is yet to be heard and/or determined. In the circumstances, while the court acknowledges the existence of the decree in the primary suit, it finds that no basis has been laid for the order for deposit to be granted at this early stage.
30. In the end, this application fails in its entirety for lack of merit. It is hereby dismissed with costs to the Interested Party. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 30TH APRIL 2025.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Ateko for the Plaintiff/Applicant

Mr. Azangalala for the Interested Party

