



REPUBLIC OF KENYA



**Kirimi v Directline Assurance Co Limited; Julius & another (Interested Parties)
(Civil Suit E027 of 2024) [2025] KEHC 7641 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL SUIT E027 OF 2024**

**HM NYAGA, J
MAY 29, 2025**

BETWEEN

GEORGE KIRIMI PLAINTIFF

AND

DIRECTLINE ASSURANCE CO LIMITED RESPONDENT

AND

AGNES GIKUNDI JULIUS INTERESTED PARTY

LIFELINE AUCTIONEERS INTERESTED PARTY

RULING

1. The applicant vide a Notice of Motion dated 30th October 2024 brought under Sections 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* and Order 22 Rule 22 and 59, Order 40 and Order 51 Rule 1 of the Civil Procedure Rules seeks for the following orders;
 - i. Spent.
 - ii. Spent
 - iii. Spent
 - iv. That pending the hearing and subsequent determination of the suit herein, a temporary injunction does issue restraining the 1st interested party, its agents Lifeline Auctioneers-the 2nd interested party and their employees from attaching selling, transferring, leasing, disposing alienating or otherwise interfering with the plaintiff's motor vehicles registration numbers KCD 541Q, KBR 542U KBA 104M and any other movable assets owned by him.
 - v. That subsequent to prayer (iv) above, this Honourable Court be pleased to set aside the execution proceedings against the plaintiff in Nkubu MCCC No. 81 of 2019- Agnes Gikundi



Julius vs Geoge Kirimi including the warrants of attachment of movable property issued to Lifeline Auctioneers.

- vi. That this Honourable Court be pleased to issue such other or further orders as it deems expedient to meet the ends of justice.
 - vii. That the costs of this application be provided for.
2. The application is premised on the grounds set out on the face of it and is supported by the affidavit of the applicant sworn on even date.
 3. In a nutshell, the applicant's case is that;
 - a. That at all material times relevant to this suit, the plaintiff was the lawful owner of motor vehicle registration number KCD 541Q and had insured the said vehicle with the defendant under policy number 07103645 covering such persons as are specified in the policy in respect of accident or death by the use of the said motor vehicle, thereby an accident caused was a liability covered under the said policy within the meaning of section 5(a) of CAP 405 laws of Kenya.
 - b. That the said motor vehicle was involved in a road traffic accident on 10th March 2019 and the applicant was sued by the 1st interested party. That the suit was defended by the defendant's advocates. That judgment was entered against the applicant for ksh. 732,052/- inclusive of costs.
 - c. That despite having insured the applicant, the defendant has failed to settle the decretal sum owing to the 1st interested party and as a consequence, warrants of attachment and sale were issued against the applicant's motor vehicles.
 - d. That under the provisions of Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, the defendant is liable to make good the decretal sum awarded by the court at Nkubu.
 - e. That due to the defendant's failure to act as provided by the law, he filed this suit to compel it to settle the decretal sum
 - f. That if the orders are not granted the applicant's property will be sold in realization of the decree and the suit herein will be rendered nugatory.
 4. The defendant appeared and stated that they were not opposed to the application.
 5. Despite service, the 1st interested party did not file a response. However, she entered appearance to the suit.

Analysis & Determination

6. I have considered the Application and the supporting affidavit together with annexures thereto.
7. I have noted that the defendant has, and conveniently so, not opposed the application.
8. The single issue for determination is whether the Court should grant the orders sought. That is to say, should this court injunct the 1st interested party from executing a lawful decree of the primary suit pending determination of this suit?
9. In this case it is not disputed that the Plaintiff/Applicant is the judgement debtor in the primary suit whereas the 1st Interested Party is the decree holder.



10. It is also not disputed that the applicant's motor vehicle was insured by the defendant at the time of the accident.
11. There has been a lot of litigation over the issue now before this Court. There is a variance of findings by the High Court on whether such an application or suit can succeed. Some courts have found merit in such applications while others have not.
12. For instance, in *Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & Another* [2014] eKLR the court stated as follows:

“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.”

13. Another illustration is the case of *Alois Ochieng Ndege vs. Explico Insurance Co. Ltd. vs. Jane Wachuka Munene (Interested Party)* (2022) eKLR where it was held that:

“Upon considering the rival positions above, I am of the view that in the circumstances of this case, the plaintiff has reasonably demonstrated the manner in which he stands to suffer substantial loss if an order for a stay of execution is denied. However, it is noteworthy that upon considering the interest of the interested party who already has a judgment in her favor of which she is entitled to enjoy the fruits, it is imperative for the hearing and prosecution of the declaratory suit to be expedited.”

14. Lastly, in *Njeru Patrick vs Invesco Assurance Co. Ltd.* (2021) eKLR the Court stated that:

“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 Kithimani PMCC No. 317 of 2016 pending the determination of this suit on condition that the Plaintiff/Applicant secures a bank guarantee or any other form of security, movable or immovable, for the said decretal sum as security for the due performance of the decree or order as may be ultimately be binding on him within 30 days of this order. In default the stay will automatically lapse.”

15. On the flip side, there are other courts that have found that such applications and suits are not tenable. I will cite a number.



16. In Dollk Limited Vs Invesco Assurance Co. Ltd. & Others (2018) eKLR it was held that: -

“It follows that this suit does not meet the test of a subrogation suit. However, whereas an insured may well be entitled to seek a declaration that its insurer is entitled to settle the claims covered under the insurance policy, that statutory right of action does not bar a person who is injured from executing the decree issued in its favour against the insured directly.”

17. In Jane Wanjiru Mwangi Vs. Xplico Insurance Co. Ltd. & Another (2021) eKLR the Court held that: -

“It is clear from the motion that the order sought is that a stay of execution of the judgment in the primary suit pending the hearing of the declaratory suit and that the said motion is predicated on the provisions of Sections 1A & 1B, 3, 3A and 63 (e) of the Civil Procedure Act; Article 159 (2) of the Constitution; and Order 51, Rules 1, 3 and 4 of the Civil Procedure Rules.

Upon consideration of the cited provisions, I observed that none of them necessarily cater for a situation touching on a stay of execution of a decree pending the hearing and determination of an entirely new suit.

It is apparent the applicant is seeking a declaratory judgment against the defendant, her alleged insurer, and not against the interested party. It is also apparent that the judgment delivered in the primary suit has not been challenged by way of an appeal or review.

That notwithstanding, I find that while the applicant is entitled to file a declaratory suit against the defendant pursuant to the provisions of the Insurance (Motor Vehicles Third Party Risks) Act, in a bid to have the insurer settle any pending claims arising out of an insurance policy entered into between an insurer and its insured, this does not necessarily bar a decree holder from pursuing the decretal sum from an insured person, such as the applicant in this instance. This position is supported by the case of Peter Kilonzo Kioko v Monarch Insurance Co. Ltd; Kisakwa Ndolo King`oku (Sued as Legal Representative of the Estate of Mwanja Kisakwa - Deceased (Interested Party) [2021] eKLR in which the court determined thus:

“The applicant herein is not seeking judgment against the interested party. It is seeking judgment against its insurer, the Defendant. There is no judgment which the insurer has obtained against the applicant which is sought to be stayed in these proceedings...However, whereas an insured may well be entitled to seek a declaration that its insurer is entitled to settle the claims covered under the insurance policy, that statutory right of action does not bar a person who is injured from executing the decree issued in his favour against the insured directly.”

I am convinced that even after the applicant herein satisfies the decretal sum in the primary suit, she can still pursue the present declaratory suit against the defendant and seek compensation therefrom. In my view, it would not be in the interest of justice to hinder the respondent from realizing the fruits of his judgment.”



18. In *Buzeki Enterprises Ltd Vs African Merchant Assurance Ltd* (2021) eKLR, it was held as follows:

“That aside, I observe that the trial court proceeded to entertain the application dated 20.12.2018, yet the provisions of section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act do not provide for stay of execution. The said section provides that:

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 judgments.

The 1st respondent was thus justified in seeking a declaratory judgment against the 2nd Respondent, its alleged insurer. I also note that the judgment delivered in the Siaya PMCC 75 of 2016 has not been challenged by way of an appeal or review. However, whereas an insured may well be entitled to file for a declaration that its insurer is obliged to settle decree against the insured under the insurance policy, that statutory right of action does not bar a person who is injured from executing the decree issued in its favour against the insured directly as was held in the case of *Dolk Limited* (supra).

In the circumstances, it is my view that the trial court erred in staying execution of decree issued in favour of the appellant against the 1st Respondent insured, pending the hearing and determination of the declaratory suit. This is because the application dated 20.12.2018 was firstly, *res judicata* the application dated 24.9.2018 filed by the 1st respondent in Siaya PMCC 75 of 2016 and secondly, because the filing of a declaratory suit is no bar to execution of decree by a genuine decree holder.

In the end, I find and hold that the trial Magistrate erred in granting stay of execution of decree in Siaya PMCC No. 75 of 2016 by a ruling delivered on the 27.6.2019 in Siaya Principal Magistrates Court Civil Case No. 36 of 2019. I allow this appeal, set aside and vacate the orders issued on 27/6/2019 by Hon James Ongóndo, Principal Magistrate and substitute them with an order dismissing the application dated 20th December, 2018. The appellant shall have costs of this appeal and of the application in the lower court, giving rise to this appeal.”

19. Lastly, in *Stephen Amollo Odhiambo Vs Monarch Insurance* (2022) KEHC 15610 (KLR) it was held that:

“I must however state that the primary obligation of settling the decree falls squarely on the plaintiff and in the event that the Defendant as his insurer fails to satisfy the decree, the plaintiff will still be called upon to satisfy the same. In other words, the mere fact that the Defendant is bound both contractually and statutorily to satisfy the decree does not absolve the plaintiff from meeting his obligations under the tort of negligence.

In addition, nothing prevents the plaintiff from settling the decretal sum and then enforcing that same decree against the Defendant for reimbursement. That in my view will not render this suit nugatory as the plaintiff can, upon settling the decree, amend his plaint and seek for reimbursement of the monies paid to the interested parties. Further, it is admitted by



the plaintiff that the defendant had already started settling the decretal sum to the tune of Kshs 396,080.”

20. Having considered the cited authorities, I will now weigh in on the issue.
21. Section 5 of the Act in question obligates all vehicles classified under the Act to take out insurance against liability by 3rd parties. The section reads as follows:

“In order to comply with the requirements of section 4, the policy of insurance must be a policy which—

- (a) is issued by a company which is required under the *Insurance Act*, 1984 (Cap. 487) to carry on motor vehicle insurance business; and
- (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

22. Section 10(1) of the Act obligates an Insurance Company to compensate any 3rd party injured or dies as a result of any accident including its insured. It reads as follows;

“Duty of insurer to satisfy judgments against persons insured

- (1) 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 judgments.”

23. It is pursuant to this provision that the Defendant insured the Plaintiff under the policy between them.
24. In my opinion, the law provides for the requirement that such a cover be taken out. The cover, once issued, becomes a contractual agreement between the insurer and the insured, in this case the defendant and the plaintiff herein. Therefore, the 1st interested party has no role to play in a dispute between the Plaintiff and Defendant.
25. In *Daniel Mutua Musyoki Vs. Amaco Insurance Company Ltd & Another* (2023) eKLR, I dealt with a similar application. I found that:

“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.

In my opinion, the suit against the 2nd respondent was ill conceived. He is not privy to the contract between the applicant and the 1st Respondent, who has conveniently failed to file any response. The matter is between the applicant and its insurer. Period.



Entertaining this application and the suit for that matter will set an unacceptable precedent whereby any insured entity, on its own motion or covertly urged by its insurance company, will be moving to court to seek orders of this nature. This will defeat the purpose of the Act, which was to protect the rights of successful judgment holders in suits against a party who is insured under a policy falling within the ambit of the Act.

I am thus of the opinion that the plaintiff's case against the 2nd respondent has any foundation in law."

26. I wish to reiterate this as my position. In doing so I do respectfully disagree with my sister and brother judges who have held views to the contrary.
27. To buttress my position, I will look at a similar scenario but now involving the 1st interested party and the defendant herein. Once a judgment in a primary suit is entered against defendant, the Plaintiff, on her own, has the right to file a declaratory suit against the Insurance company. She cannot, in that suit, seek to join the Insured who she had sued in the primary suit. The issues between the Plaintiff and the Interested Party were determined in the primary suit and cannot be canvassed again. By the same analogy, I find that the 1st Interested Party has no business in the suit between an Insurer and Insured.
28. Looking at the Plaintiff, there is no prayer sought against the 1st interested party. The sole prayer is against the Defendant who has conveniently and to no surprise, conceded to the application.
29. Courts must be wary of suits of this nature which have become a common occurrence. It is very likely that an insurer and an insured may decide to collude to file a suit of this nature. Once stay or injunction is granted, the 1st Interested Party has nowhere to turn to. He/she has no control of the suit between the plaintiff and defendant.
30. Just like my brother and sister judges who have held this view, I hold that the primary responsibility of settling a decree lies with the party against whom it is issued. Dragging the 1st Interested Party to this suit was, in my opinion, improper. This is not an appeal against the decision in the primary suit. I don't see how a defendant can file a fresh suit and seek to stay another suit, determined by a court of competent jurisdiction, from which he never appealed.
31. I agree that Section 5 of the Act is meant to protect the insured and the 3rd party. What I don't agree with is that the said section can be used by an insured to stop a decree issued against him from being executed. He should satisfy the decree and then seek compensation from its insurer, by enforcing the contract between them.
32. It is my opinion that if such applications as the present one are to be allowed, then it is very conceivable that no judgment and decree arising out of an accident covered by an insurance company will ever be executed. Is this what the Act had in mind? I do not think so.
33. Perhaps it is time for the issue to be determined by the Court of Appeal or even the Supreme Court, so that the varying decisions can be harmonised.
34. For now, I find that the Application lacks any merit and it is dismissed.
35. Since the 1st interested party did not respond to the application there shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 29TH DAY OF MAY 2025.

H. M. NYAGA

JUDGE

