**Githuga & another v Ogunde (Civil Miscellaneous E953 of 2024)**
**[2025] KEHC 11392 (KLR) (Civ) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11392 (KLR)

**REPUBLIC OF KENYA**

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

**CIVIL**

**CIVIL MISCELLANEOUS E953 OF 2024**

**TW OUYA, J**

**JULY 31, 2025**

**BETWEEN**

**MARION WANJIKU GITHUGA ..... 1ST APPLICANT**

**JOHN KAGARI ..... 2ND APPLICANT**

**AND**

**DOREEN ACHIENG OGUNDE ..... RESPONDENT**

**RULING**

1. The Notice of Motion Application before the Court dated 27th September 2024 is premised under the provisions of Article 159(2) (d) of *the Constitution* of Kenya, Sections 79G, 1A and 3A of the *Civil Procedure Act* and Order 22 Rule 22 as read together with Order 42 Rules 4 and 6 and Order 51 Rules 1 and 3 of the Civil procedure Rules. The Applicants are seeking the following Orders from this Court:

> "(1) .....Spent.
>
> (2) That this Honourable Court be pleased to grant leave to the Applicants to file an appeal out of time against the Ruling by Hon. V.M. Mochache (RM) in Milimani Small Claims Court Case (SCCC) No. E6228 of 2023 delivered on the 9th of August, 2024.
>
> (3) That this Honourable Court be pleased to Order a stay of execution of the Judgment and Decree by Hon. V.M. Mochache (RM) in Milimani Small Claims Court Case (SCCC) No. E6228 of 2023 delivered on the 9th of August, 2024 pending the hearing and determination of this application.

(4) That the attached Memorandum of Appeal be deemed duly filed within time upon payment of the requisite fees.

(5) That the costs of this application be in the cause."

2. The suit is anchored on the grounds set out on its face as well as in the Affidavit sworn by Marion Wanjiku Githuga (the 1st Applicant herein) on 27th September, 2024. The Applicants' case is that being dissatisfied with the ruling of the trial Court dated 9th August, 2024, they intend to appeal against the same as per the attached Memorandum of Appeal marked "MWG-1". Furthermore, that the time to lodge an appeal against the trial Court's Ruling dated 9th August, 2024 has lapsed hence the need to obtain this Court's leave to appeal out of time.

3. It was the Applicants' contention that the delay in filing an appeal against the aforesaid decision of the trial Court was caused by Xplico Insurance Company Limited, the 1st Applicant's insurer presently under statutory management, by failing to satisfy the Judgment of the trial Court pursuant to the provisions of Section 10(1) of the Insurance (Motor Vehicle Third Party Risks).

4. Furthermore, a moratorium was declared effective on 9th December 2023 freezing all payments due to the creditors and policy-holders of Xplico Insurance Company Limited for a period of 12 months as per the annexed notice appearing in the Star Newspaper on 12th December 2023.

5. The Applicants averred that the delay is lodging their appeal against the decision of the trial Court delivered on 9th August, 2024 was inadvertent and due to an excusable human error and urged the Court to stay execution of the same because in the event their appeal is successful they will not be recover the sum of Kshs.460,550/- rendered to the Respondent pursuant to the holding of the trial Court because the Respondent is a person of unknown means.

6. The Respondent resisted the suit through her Replying Affidavit sworn on 3rd December 2024. She characterized the subject suit as motivated by the sole purpose of denying her the fruits of a successful Judgment and subscribed to the position that, because she is not a party to the Contract between the Applicants and Xplico Insurance Company Limited, execution of the trial Court's decision cannot be obstructed or delayed on the basis of a contract executed between the said parties.

7. Furthermore, the Applicant's intended appeal lacks merit and amounts to an abuse of the due process of the Court. The Respondent argued that, in the vent of an appeal, the law requires the Judgment Debtor to furnish security of the total amount awarded in the Judgment which the Applicants have failed to do. The Court was urged to direct the Applicants to deposit the decretal amount as security in a joint account held by the parties' advocates in the event the Court is minded to allow the reliefs sought in the instant suit.

8. The suit was canvassed by way of written submissions. The Applicants filed written submissions dated 5th December 2024 through their Counsel. They reiterated that the delay in commencing appeal against the decision of the trial Court is attributable to excusable human error as the applicants were pursuing the option of getting their insurer to settle the judgment sum and it when those efforts proved unsuccessful, the Applicants turned to appeal.

9. Reliance was placed in the holding of the Court in the case of Kamlesh Mansukhalal Damki Pattni V Director of Public Prosecutions & 3 Others [2015] eKLR, to buttress the argument that Courts of Law ought to be hesitant to shut the door to the corridors of justice without granting a litigant the opportunity to be heard on his complaint.

10. The Respondent filed written submissions dated 4th December 2024 through his counsel and argued that in the current suit, the Applicants are not challenging the Judgment of the trial Court dated 14th June 2024 in favour of the Respondent, rather, they are challenging the trial Court's Ruling dated 9th August 2024 dismissing their application for stay of execution.

11. Relying on the doctrine of privity of Contract, the Respondent argued that a contract cannot confer rights or impose obligations on any other person apart from the parties to the aforesaid contract. Therefore, the Respondent is not bound by the terms of the contract executed between the Applicants and Xplico Insurance Company Limited.

12. It was further submitted that the Applicants have failed to satisfy the conditions for the grant of stay of execution pursuant to the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules. Guidance was sought in the reasoning of the Court in the cases of Halai & Another V Thornton & Turpin (1963) Ltd [1990] KLR 365; In re Blue Shield Insurance Company Ltd [2020] ekLR; Kamakya V Resolution insurance Limited; and, Ngumbi (Interested Party) (Civil Case E005 of 2020) [2024] KEHC 891 (KLR) (7 February 2024).

13. The Respondent argued that the Applicants failed to disclose their willingness to furnish security for the due performance of the Order of the trial Court which is an essential ground in granting stay pending appeal. Reliance was sought in the holding of the Court in Mwaura Karuga t/a Limit Enterprises Vs Kenya Bus Services Ltd & 4 Others [2015] eKLR; Giafranco Menathi & Another Vs Africa Merchant Assurance Company Ltd [2019] eKLR; Focin Motorcycle Co. Limited Vs Ann Wambui Wangui & Another [2018] eKLR; and, Machira T/A Machira & Co Advocates Vs East African standard (No 2) [2002] KLR 63.

14. The Respondent subscribed to the position that the Applicant has failed to satisfy al the conditions warranting grant of a stay of execution as sought and urged the Court to dismiss the Applicants' cause.

15. The Court has carefully perused the pleadings and rival submissions of the parties and identified the following two (2) issues for determination:

    I. Whether the suit is merited.

    II. Who shall bear the costs of the application?

**Issue Number 1 Whether the suit is merited**

16. The subject suit concerns the granting of an order for a stay of execution pending appeal. Order 42, Rule 6(2) of the Civil Procedure Rules, 2010 sets out the conditions to be met when it comes to an application for a stay of execution as follows:

    " a) The application must be brought without unreasonable delay;

    b) The applicant must demonstrate that substantial loss may result; and

    c) Provision should be made for security."

17. The Applicants admitted that the subject suit was filed following undue delay which they claimed was occasioned by Xplico Insurance Company Limited, currently facing statutory management. However, in paragraph (k) of the subject Application, the Applicant averred as follows: "THAT this application has been brought without any unreasonable delay" which statement contradicts the Applicants' admission regarding delay. On the question of substantial loss, it was the Applicants' position that in the event their intended appeal is successful they will not be able to recover the decretal sum paid to

the Respondent because his financial means are unknown to them. It is instructive that the Applicants did not offer to provide security for the performance of the trial Court's Decree.

18. Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act stipulates as follows:

> " 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.
>
> Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule."

19. In the case of Daniel Mutua Musyoki vs Amaco Insurance Company Ltd & Another (2023) eKLR, the Court appreciated the meaning and import of Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act in the following terms:

> " 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."

20. In the suit before the Court, the Applicants argued and submitted that their insurer became the subject of moratorium dated 9th December 2023 which froze all payments to the insurer's creditors and policy-holders. It is noteworthy that the trial Court's Judgment in favour of the Respondent is dated 14th June 2024 and the Applicant's application seeking stay of execution of the same was dismissed by the trial Court on 9th August 2024. Form the foregoing, it is evident that the aforementioned moratorium predated by more than six (6) months the issuance of the decision of the trial Court dated 14th June 2024. The Court is persuaded to impute knowledge about the existence of the aforesaid moratorium on the Applicants, being the insured. In the event, the Court is not satisfied with the Applicants explanation regarding the delay in commencing the present suit.

21. The Court in the case of Stephen Amollo Odhiambo Vs Monarch Insurance (2022) KEHC 15610 (KLR) proclaimed as follows:

> " 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.

ii. 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."

22. Being guided by the reasoning of the Court as above, the Court holds and finds that the Applicants bore the primary obligation of settling the decretal sum owed to the Respondent which obligation was not obviated by the aforementioned moratorium dated 9th December 2023.

23. Furthermore, the Applicants have failed to demonstrate that they stand to suffer substantial loss unless a stay of execution pending appeal is granted or to offer any security in satisfaction of the decree of the trial Court. In the event, the Court holds and finds that the Applicants have failed to satisfy all three conditions for the grant of a stay of execution as per Order 42 Rule 6(2) of the Civil Procedure Rules.

24. The following Final Orders will ensue:

i. The appeal is found unmerited and is hereby dismissed.

ii. The Applicants to bear the Respondent's costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31 ST JULY , 2025.**

**HON. T. W. OUYA**

**JUDGE**

For Applicant.....Angwenyi HB Bore

For Respondent.....No Appearance

Court Assistant.....Brian