



**Chira v Africa Merchant Assurance Co Ltd & 3 others (Civil Appeal
E035 of 2023) [2024] KEHC 6369 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6369 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL APPEAL E035 OF 2023
AK NDUNG’U, J
MAY 30, 2024**

BETWEEN

GEORGE MUNENE CHIRA APPELLANT

AND

AFRICA MERCHANT ASSURANCE CO LTD 1ST RESPONDENT

JM NGUNJIRI T/A TANGO AUCTIONEERS 2ND RESPONDENT

PETER MARIKU NJEGE 3RD RESPONDENT

DORCAS MUTHONI 4TH RESPONDENT

RULING

1. This ruling resolves the notice of motion dated 7th November, 2023. The application seeks stay of execution of the decree arising from Nyahururu CMCC No. E165 of 2021 and Nyahururu CMCC No. E169 of 2021 pending hearing and determination of the appeal, secondly, that the court do issue stay of sale of motor vehicle registration number KBT 914C Nissan Venette pending hearing of appeal and thirdly, the 2nd Respondent be ordered to release the said motor vehicle unconditionally or on condition set by this court pending hearing of the appeal.
2. The application is brought under Section 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act*, Order 40, Rule 1, 2 and 3, Order 42 Rule 6 of the Civil Procedure Rules, 2010. Interim stay was granted by this court on 8th November, 2023.
3. What is sought to be appealed against is the ruling of the trial court dismissing the Applicant’s application for stay delivered on 31st October, 2023. The said ruling is however not attached to the instant application.
4. The application is based on the grounds on the face thereof and is supported by an affidavit of George Munene Chira, the Applicant. He deponed that he is the registered owner of motor vehicle registration



number KBT 914C Nissan Venette. That he filed a declaratory suit against the 1st Respondent and on the same day, he filed an application for stay of sale/execution of the decree in CMCC E165 of 2021 and CMCC E169 since the said motor vehicle was attached without being served with a proclamation notice. The said application was however dismissed on 31st October, 2023 and the 2nd Respondent proceeded to advertise the motor vehicle for sale on 10th November, 2023.

5. He stated that he had a valid insurance cover issued by the 1st Respondent and therefore, it is in the interest of justice that the stay orders be granted. That he had taken necessary steps to ensure the insurer paid the decretal amount by writing to it immediately after delivery of judgment and was waiting for extraction of decree and assessment of costs to forward the same to the insurer. He was however not served with any decree of the court prior to the execution and that the trial court failed to appreciate that the necessary provision was Order 40(1) and Section 63(e) since the application related to property about to be sold. The trial court further failed to appreciate that filing of a declaratory suit is not automatic and is only necessary if the insurer has refused to settle the decree. That if execution is allowed, the instant appeal and the declaratory suit will be rendered nugatory and therefore, it is in the interest of justice that the orders sought be granted.
6. The 3rd and 4th Respondents filed a joint replying affidavit dated 13th November, 2023 sworn by the 3rd Respondent. The 1st and 2nd Respondents did not respond to the application.
7. The 3rd Respondent averred that the application is frivolous, vexatious and an abuse of the court process. That the Applicant has not satisfied the decrees dated 7th August, 2023 whereas no appeal lies against the said decrees. That they are not privy to the insurance contract between the Applicant and 1st Respondent and payment of decretal amount will not stop the Applicant to seek for a refund from the insurer. Further, the claim by the Applicant has been denied by the 1st Respondent and it is only fair that the decretal amount be paid as they settle their issues in court. That CMCC 131 of 2023 is a declaratory suit and the Applicant has been aware of the judgment of the lower court which was pronounced in his presence and therefore the instant application is a waste of judicial time and a delaying tactic which ought to be dismissed.
8. The application was canvassed by way of written submissions. The Applicant stated that he expected the insurer to honour the policy and that is why he did not prefer any appeal. On 6th June, 2023, he wrote to the insurer and undertook to forward the decree once he was served with it by 3rd and 4th Respondents. The insurer did not indicate any intention of declining to honour the policy and therefore, there was no need of filing a declaratory suit.
9. That the decree was extracted on 7th August, 2023 and the same was not served upon his advocate. Further, he was not served with a proclamation notice and a notification of sale as they were served the day the motor vehicle was taken by auctioneers. Consequently, he filed a declaratory suit.
10. He argued that the appeal has high chances of success and the same will be rendered nugatory if the orders sought are not granted. He stated that the trial court failed to appreciate that orders for stay pending a declaratory suit are different from stay pending appeal. Further, it is only after he insurer declines to settle the decrees that a declaratory suit becomes necessary therefore, the trial court erred by finding that there was inordinate delay in filing the declaratory suit. The court further erred by failing to find that it was irregular for the 3rd and 4th Respondents failing to serve the decree upon the Applicant but instead commenced with execution. The court further failed to consider that he was not served with a proclamation by the 2nd Respondent but the same was served together with the notification of sale at the time the motor vehicle was picked.



11. On whether he has shown sufficient cause for the orders to be granted, he stated that he had complied with the Insurance (Motor Vehicle Third Party Risks) Act by taking out an insurance policy against third party risk. He also filed a declaratory suit to enforce the policy and therefore, it will be extremely unfair to allow sale of his business vehicle. Further, if execution proceed, he will not only lose his vehicle but the 3rd and the 4th Respondents will proceed to further execute the decree against him since the sale of the vehicle cannot recover the entire decretal amount. He will suffer this despite the fact that he had paid the premiums as required.
12. The 3rd and 4th Respondents on the other hand submitted that having obtained a valid judgment, they were rightly pursuing what is rightfully theirs. Further, the 1st Respondent filed a defence where they denied the Applicant's claim and therefore, they cannot be dragged into issues they are not parties to. That the judgment was pronounced in presence of the Applicant and his advocate, the decree and certificate of cost were served and a proclamation notice. The Applicant did not do anything and it is after the attachment of the motor vehicle that he rushed to court to file a declaratory suit and stay of execution. That if indeed he needed stay orders now sought, he ought to have applied the same after the delivery of the judgment.
13. Further, the 1st Respondent was not a party to the suits before the trial court and there was no order that was issued that the 1st Respondent was to settle the decretal amount. Therefore, the instant suit seeks to hinder them from enjoying the fruits of their rightful judgment.
14. On whether the Applicant has met the conditions for granting stay, they submitted that the Applicant waited for three months to seek for orders of stay, hence the delay was unreasonable. That the Applicant is a person of means capable of settling the decretal amount and in the event the declaratory suit is successful, he stands to be reimbursed and thus he does not stand to suffer any loss or prejudice. Further, he has not offered any security which is prerequisite requirement while seeking for orders of stay and therefore, the application lacks merit.
15. It is submitted that there is no law that bars a decree holder from executing whether or not a declaratory suit exists. Reliance was placed on *Kassam Hauliers Limited vs Mezgebu Gatachew Mammo (2022) eKLR* and *Jenipher Anyango Oloo vs Buzeki Enterprises Limited & Another (2021) eKLR* where the courts stated that although the insured is entitled to file a declaratory suit against the insurer, that does not bar the decree holder from executing the decree issued in its favour against the insured directly.
16. I have read through the application, the replying affidavit and considered the rival arguments by the parties herein.
17. The principle guiding the grant of stay of execution pending appeal are provided for under Order 42 Rule 6(2) of Civil Procedure Rules which provides:

“No order for stay of execution shall be made under sub-rule (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.”
18. Therefore, an Applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned; namely (a) that substantial loss may result to the Applicant unless the order is made; (b) that the application has been made without unreasonable



delay; and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given.

19. I hasten to add that in an application for stay pending the determination of a declaratory suit on the legal obligation of an insurer to compensate 3rd parties, an order of stay can be issued with little variation of the requirements under Order 42 Rule 6(2) of Civil Procedure Rules.
20. This is so, in my view, as an insured who has complied with the terms of an insurance contract between him and the insurer ought to have the protection of the law, and for that matter, the court, albeit for a determined period, to seek to enforce the contract insulating him from third party claims through a declaratory suit. Anything to the contrary would be prejudicial and cause an injustice to an insured who in the first place entered into a contract of insurance to avoid such liability.
21. I would associate myself with the sentiments of Odunga J (as he then was) in *Ndonye v Invesco Assurance Co. Ltd (Civil Suit 23 of 2021)* [2022] KEHC 416 (KLR) (5 May 2022) (Ruling) Neutral citation: [2022] KEHC 416 (KLR) where he stated;

“However, one cannot lose sight of the fact that the Applicant is in effect seeking that the Defendants

Pays the Interested Party the sum due to the Interested Party from the Applicant. Unless some measure

of protection is given to the Applicant, his suit as presently framed may well be an academic exercise.

To that limited extent I agree with the reasoning in the case of Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & Another [2014] eKLR where the court stated as follows:

“However, one cannot lose sight of the fact that the Applicant is in effect seeking that the Defendants pays the Interested Party the sum due to the Interested Party from the Applicant. Unless some measure of protection is given to the Applicant, his suit as presently framed may well be an academic exercise. kenyalaw.org/caselaw/cases/view/233297/ 5 To that limited extent I agree with the reasoning in the case of Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & Another [2014] eKLR where 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...”

22. While the grant of stay pending a declaratory suit is special and may not necessary be tied to the conditions under Order 42(2)(6), the conditions are still relevant. Courts have variously expressed themselves in regard to the criteria for the grant of stay pending appeal. In *RWW vs EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words;

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the Appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award



of costs. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

23. As to what substantial loss is, it was observed in *James Wangalwa & Another vs Agnes Naliaka Chesoto* [2012] eKLR 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 it the case here, does not itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process. The Applicant must establish other factors which shown 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 issues 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.”

24. *Musinga J in Daniel Chebutul Rotich & 2 Others vs Emirates Airlines Civil Case No. 368 of 2001* also stated that;

“It is not enough for an Applicant to merely state that it is likely to suffer substantial loss, it must make effort to demonstrate how the same is likely to occur. Disruption of business and loss of reputation can only be suffered if stay of execution was refused and the Applicant refused to pay or became unable to pay and auctioneers had to move in to carry out execution. “Substantial loss” is a relative term and more often than not can be assessed by the totality of the consequences which an Applicant is likely to suffer if stay of execution is not granted and the Applicant is therefore forced to pay the decretal sum.”

25. The Applicant’s case is that at the time of the accident, his motor vehicle was insured by the 1st Respondent. That the two cases proceeded to their finality in favour of the 3rd and 4th Respondents. Through his advocate, he wrote a letter addressed to the 1st Respondent informing it of the outcome of the cases and in the said letter, the Applicant’s advocate indicated that a decree will be served upon the 1st Respondent once it is ready. There was no response from the 1st Respondent. Three months after the delivery of the judgment, the 2nd Respondent attached the Applicant’s motor vehicle. He claimed that he was not served with the decree nor the proclamation notice prior to the attachment and the same was served when the 2nd Respondent went to attach his motor vehicle.

26. He therefore filed the application subject to the intended appeal seeking for stay and declaratory suit against the 1st Respondent.

27. The 3rd and 4th Respondent on the other hand stated that they were not privy to the contract between the Applicant and the 1st Respondent. Further, the Applicant was indolent and waited for three months to file the declaratory suit. They further stated that a declaratory suit cannot bar the decree holder to execute a decree against the decree debtor. He can be indemnified by the insurer if there was a valid contract between them. They attached a defence statement by the 1st Respondent to the declaratory suit denying that the Applicant had a valid cover at the time of the accident.

28. Indeed, the Applicant wrote to the insurer informing it of the outcome of the two judgments and also indicated that a decree will be served upon service of the same to the Applicant’s advocate. The 3rd and



- 4th Respondent claimed that the decree and the proclamation notice were served upon the Applicant but there is no proof of such service.
29. As to whether the Applicant will suffer substantial loss, I am quick to point out that the circumstances in this case give rise to a delicate balancing act. On the one hand are parties with a judgment of court requiring payment of damages. On the other hand, is an insured person who claims to be insulated from the risk giving rise to the damages through an insurance cover. The said insured has moved to court to enforce this right.
30. The Applicant is the judgement debtor in the primary suit where the 3rd and 4th Respondents are the decree holders. The Applicant contends that the 1st Respondent was the insurer of the vehicle which caused the accident the subject matter of that primary suit and that contention is not challenged by the 1st Respondent in this application. In the suit before the lower court, the Applicant seeks to compel the 1st Respondent to meet its obligations under the contract of insurance by satisfying the said decree. In the meantime, he seeks to have the execution and proceedings in the primary suit stayed.
31. In the instant application, the Applicant seeks stay execution of the decree in the primary suit pending appeal against the ruling of the lower court declining his application for stay pending the determination of the declaratory 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 his favour against the insured directly.
32. However, it would be remiss of this court to lose sight of the fact that the Applicant is in effect seeking that the 1st Respondent pays the 3rd and 4th Respondents the sum due to them from the Applicant. Unless some measure of protection is given to the Applicant, the declaratory suit filed may well be an academic exercise.
33. I must however state that the primary obligation of settling the decree falls squarely on the Applicant and in the event the 1st Respondent fails 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.
34. As noted above, the applicant seeks a stay pending Appeal against a decision of the lower court denying him a stay of execution in the primary suit. It is not lost on this court that assuming that he was to eventually succeed in getting a stay order, the stay would afford him protection to pursue his remedy through the prosecution of the declaratory suit. I have taken the liberty to peruse the record in Nyahururu CMCC 131 of 2023, the declaratory suit. Since the delivery of the ruling dismissing the Applicant's application for stay before the lower court on 31/10/23, and despite the long period that the Applicant has enjoyed stay orders during the pendency of this application, no single step has been taken towards prosecuting the declaratory suit a whole 7 months down the line.
35. A stay of execution is not granted in a vacuum. It is granted pending an event. In this case, that event is the declaratory suit. The same is stagnant. What then would the stay serve?
36. This when decree holders have been waiting for the fruits of judgement. Am alive to the need to insulate an insured against the dereliction of legal duty by an insurer to compensate third parties injured and who are covered within the terms of the insurance contract. I must add, however, that such protection will only materialize for a diligent litigant and is not available where blatant indolence is exhibited.



37. Again, one condition for grant of stay is an offer of security. None is even suggested. That, based on my exposition above, may not have mattered much had the applicant demonstrated keenness in the prosecution of the declaratory suit. In the premises, the application for stay must fail.

38. With the result that the application lacks merit and is dismissed. In the circumstances of this case, I direct that each party is to bear their own costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF MAY 2024.

A.K. NDUNG’U

JUDGE

