



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 2077 OF 1999**

**PHYLLIS WANGUI NJAU.....PLAINTIFF**

**VERSUS**

**HERITAGE CONTRACTORS LTD.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated 27<sup>th</sup> March 2017 and filed on 30<sup>th</sup> March 2017 was brought under section 3A, and 63(e) of the Civil Procedure Act Cap 21, Order 17 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It sought the following prayers:-

- 1. That the Defendant (sic)/Respondent's Application dated 22<sup>nd</sup> July 2013 be dismissed for want of prosecution.**
- 2. That the Plaintiff/Applicant be allowed to execute the Judgment dated 14<sup>th</sup> December 2012 in her favour.**
- 3. That the costs of the application be provided for.**

2. Her Written Submissions were dated and filed on 27<sup>th</sup> April 2019. The Defendant's Written Submissions and list of Bundle of Authorities were dated 18<sup>th</sup> April 2019 and filed on 23<sup>rd</sup> April 2019.

3. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE PLAINTIFF'S CASE**

4. The Plaintiff's present application was supported by the Affidavit of her advocate, Geoffrey Chege Kirundi that was sworn on 27<sup>th</sup> March 2017.

5. Her case was that judgment was entered in her favour on 14<sup>th</sup> December 2012 in the sum of Kshs.10,800,000/= general damages, Kshs. 231,760.78 special damages, interest at court rates on special damages from date of filing suit till payment in full, interest on general damages at court rates from the date of judgment till judgment in full together with costs.

6. She extracted the Decree and applied for its execution. However, on 20<sup>th</sup> December 2012, the Defendant filed an application to stay the judgment pending appeal. It subsequently filed an amended Notice of Motion application dated 22<sup>nd</sup> July 2013 seeking a stay of proceedings pending the currency of the moratorium over United Insurance Company Limited.

7. She pointed out that despite the firm of M/S Ithondeka & Co. Advocates being granted a period of thirty (30) days to file a formal application to come on record for the Defendant herein, it had not done so at the time of her filing the present application.

8. She also averred that the Defendant had also never fixed its Notice of Motion application dated 22<sup>nd</sup> July 2013 for hearing and since it was filed, the same ought to be dismissed to enable her tax her bill of costs and proceed with execution.

9. She termed the Defendant's Notice of Motion application dated 22<sup>nd</sup> July 2013 an abuse of court process and urged this court to allow her application as prayed.

### **THE DEFENDANT'S CASE**

10. The Plaintiff's present application, the Defendant's Operations Manager, Christopher Onyango swore a Replying Affidavit on behalf of the Defendant on 22<sup>nd</sup> February 2019. It was filed on even date. On 25<sup>th</sup> February 2019, a director of the Defendant, Jaspal Singh Obhral also swore a Replying Affidavit on 22<sup>nd</sup> February 2019. It was filed on 25<sup>th</sup> February, 2019.

11. The Defendant's case was that its Motor vehicle Registration No KXN 041 (subject motor vehicle) was involved in an accident on 17<sup>th</sup> September 2017. The said motor vehicle had been Insured by United Insurance Company Limited (hereinafter referred to as "the Insurer") vide Policy Number CNMCP 31492. However, on 15<sup>th</sup> July 2015, the Commissioner of Insurance invoked his statutory powers and placed the Insurer under Statutory Management with Kenya Reinsurance Corporation Limited (hereinafter referred to as "the Statutory Manager") as the Statutory Manager.

12. On 27<sup>th</sup> October 2009, in **HCCC No 545B of 2006 United Insurance Company, under Statutory Management (Currently HCCC No 67 of 2012)** the Statutory Manager sought and obtained orders staying all proceedings involving the insurer or its Insureds during the pendency of the moratorium.

13. It averred that since then the moratorium had been extended by different statutory managers with the last extension having been on 8<sup>th</sup> March 2018 for a further one (1) year and that because the same had never been set aside, it remained effective and enforceable to date. It was emphatic that the moratorium it applied to all classes of creditors and policy holders without any exception or preference.

14. It contended that the Plaintiff could not apply for dismissal of its application for the reason that the moratorium of that application and the present application is against the orders of the court that were issued in **HCCC No.545B of 2006 (Currently HCCC No 67 of 2012)**.

15. It added that in any event, there was **Winding Up Cause No 22 of 2006** seeking to wind up the Insurer thus rendering the proceedings herein a nullity in law.

16. It was emphatic that any proceedings against it as an Insured of the Insurer was an illegality and contravention of the court orders.

17. It therefore urged this court to dismiss the Plaintiff's application and grant it a stay of execution and stay of proceedings to safeguard its interests.

### **LEGAL ANALYSIS**

18. The gist of the Plaintiff's argument was that there had been inordinate delay in the Defendant prosecuting its Notice of Motion application dated 22<sup>nd</sup> July 2013, that the delay was inexcusable and that she was likely to be prejudiced by the delay.

19. In this regard, she placed reliance on the case of **Capwell Industries Ltd vs National Irrigation Board [2015] eKLR** that applied the above principles that were set out in the case of **Allen vs. Sir Alfred Mc Alphine & Sons Ltd [1928] I ALL ER 543**.

20. She also relied on the cases of **Ivita vs Kyumba [1964] KLR 441** and **Samuel O. Nyauke vs Airtel Networks Kenya Ltd [2018] eKLR** where the common thread was that **"the test applied by court in the application for dismissal of a suit is whether delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay"**.

21. She was categorical that the Defendant could not blame the moratorium for not prosecuting its application yet in its own admission, it had stated that it took over conduct of its own matters on or about 2006 upon unwillingness and discontinuation of representation by the Insurer.

22. She referred this court to the case of **Law Society of Kenya vs AG & 3 others [2006] eKLR** where the five (5) Judge Bench held that where a dispute is presented before the court, nothing stops it from coming up with an adequate remedy.

23. It was therefore her argument that the Defendant could not prevent her from executing the judgment that was entered in her favour through the imposition of an indefinite moratorium.

24. To support her argument, she relied on the case of **Republic vs Town Clerk of Webuye County Council & Another [2014] eKLR** where the court held that: **"a decree holder's rights to enjoy the fruits of his judgment must not be thwarted when faced with such a scenario, the court should adopt an interpretation that favours enforcement as far as possible..."**

25. On its part, the Defendant argued that Section 67 (C)(10) of the Insurance Act Cap 487 (Laws of Kenya) empowers a Manager to declare a moratorium during which time there can be no execution, statutory demands, claims or any form of proceedings.

26. It relied on the cases of **Republic vs Principal Secretary, Ministry of Defence Ex Parte George Kariuki Waithaka [2018] eKLR**, **Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another [2015] I KLR 828** amongst other cases to buttress its argument that court orders must be obeyed until they are discharged.

27. Right at the outset, this court took the view that the detailed submissions by the Defendant were more relevant for its Notice of Motion

application dated 22<sup>nd</sup> July 2013 that was still pending hearing and determination. They were nonetheless pertinent for explanation why it had not prosecuted its said application. The court therefore struck a balance to consider them to support its argument for non-prosecution but not delve into the merits or otherwise of its said application.

28. It is true as the Plaintiff's submitted that when considering whether to dismiss a matter for want of prosecution, a court must consider if the delay in prosecuting a matter was inordinate, whether the inordinate delay was inexcusable and whether the inordinate and inexcusable delay had caused prejudice to a party.

29. In the case of **Agip (K) Ltd vs Highlands Tyres Ltd [2001] KLR 630** Visram J as he then was stated as follows:

**“Where a reason for delay is offered, the court should be lenient and allow the Plaintiff an opportunity to have his case determined on merit. The court must also consider whether the Defendant has been prejudiced by the delay”.**

30. In this particular case, the Defendant was emphatic that a moratorium had been placed over the Insurer and no proceedings could be commenced against the Defendant or its Insurer.

31. Section 67 C (10) of the Insurance Act provides as follows:-

**For the purposes of discharging his responsibilities, a manager shall have power to declare a moratorium on the payment by the insurer of its policy-holders and other creditors and the declaration of a moratorium shall—**

**(a) be applied equally to all classes of policy-holders and creditors, subject to such exemptions in respect of any class of insurance as the manager may, by notice in the *Gazette* specify;**

**(b) suspend the running of time for the purposes of any law of limitation in respect of any claim by any policy-holder or creditor of the insurer;**

**(c) cease to apply upon the termination of the manager's appointment whereupon the rights and obligations of the insurer, its policy-holders and creditors shall, save to the extent provided in paragraph (b), be the same as if there had been no declaration under the provisions of this subsection:**

**Provided that this subsection does not apply to any sum due as contributions or penalties to the Policyholder Compensation Fund.**

32. It was also evident that a Statutory Manager could declare a moratorium on the payment by the insurer of its policy holders and other creditors (**emphasis court**). For that reason this court could not direct that she be allowed to execute her judgment against the Defendant herein because then, in all matters involving the Insurer, the Statutory Manager was performing a statutory function.

33. Indeed, Section 67C (10) of the Insurance Act is clear that the moratorium will cease to apply upon the termination of the Manager's appointment whereupon obligations of the Insurer, Insureds and Creditors will be as if no moratorium had been declared. It is at this stage that the Plaintiff can proceed with execution of her judgment against the Defendant.

34. It was also correct as the Plaintiff argued that the court has power to try as much as possible to pave way for a decree holder to enjoy the fruits of his judgment. However, its hands will be tied if there were statutory provisions holding its hands not to pave that way. In other words, just because it has immense powers, a court cannot encroach on other authorities or entities that have powers donated to them to do certain acts by enacted legislation.

35. A moratorium is one instance where the court cannot purport to override the powers of a statutory manager who has been empowered to do certain acts by legislation. Indeed, a court must be very cautious not to overstep its mandate or to become so overzealous to ensure decree orders enjoy their fruits of judgment.

36. As long as the order for moratorium remains in place, the court will not be able to grant an order of the nature that has been sought in Prayer No (b) of the Plaintiff's present application.

37. It is unfortunate that the order for moratorium has stayed in place for so many years leaving decree holders holding paper judgments that cannot be executed much to their detriment. It is hoped that the Statutory Manager will proceed expeditiously to alleviate the suffering of so many decree holders. He ought and should give them a gleam of hope as their powers under Section 675 of the Insurance Act has left many destitute.

38. For those reasons, this court was satisfied that the Defendant could not have prosecuted its Notice of Motion application dated 22<sup>nd</sup> July 2013, an order for moratorium having been made in another suit. It was not therefore persuaded by the Plaintiff's arguments that it should be dismissed.

39. The above notwithstanding, this court was not persuaded that it could have dismissed that Defendant's said Notice of Motion application for the reason that Order 17 Rule 2(3) of the Civil Procedure Rules is clear that a party can only apply for the dismissal of a suit. It provides as follows:-

**“Any party to the suit may apply for its dismissal as provided in sub-rule 1”.**

40. Indeed, in Section 2 of the Civil Procedure Act, **“suit”** is defined as follows:-

**“all civil proceedings commenced in any manner prescribed.”**

41. A notice of motion application is not a means of commencing civil proceedings. It was this court’s view that an application that had not been prosecuted for more than a year could not come under the ambit of Order 17 Rule 2 of Civil Procedure Rules for the simple reason that an application that has not been heard and determined could not have the effect of stopping the opposing party from seeking further orders in that court. Indeed, an application for stay of execution or proceedings cannot purport to stop a party from proceeding in a suit until such time that the orders sought have been issued.

42. The Plaintiff did not therefore need leave to seek the dismissal of the Defendant’s said application and/or permission to execute her judgment because execution could only be realised upon her taking steps to execute her judgment. In this case, however, she could not execute due to the moratorium.

43. In the same vein, this court was clear in its mind that it would not contradict a court order that had been issued by the court of equal and competent jurisdiction so as to allow the Plaintiff proceed in a way, her herself was hesitant to proceed.

#### **DISPOSITION**

44. For the foregoing reasons, the upshot of this court’s decision was that the Plaintiff’s Notice of Motion application dated 27<sup>th</sup> March 2017 and filed on 30<sup>th</sup> March 2017 was not merited and the same is hereby dismissed with costs to the Defendant.

45. It is so ordered.

**DATED and DELIVERED at NAIROBI this 24<sup>th</sup> day of September 2019**

**J. KAMAU**

**JUDGE**