



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 298 OF 2017

STEPHEN KILONZO MATILIKU.....APPELLANT

-VERSUS-

PREMIER INDUSTRIES LIMITED.....RESPONDENT

(Being an appeal from the ruling and order of the Honourable D. W. Mburu, Principal Magistrate

in CMCC No. 5105 of 2009 at Milimani Commercial Courts delivered on 26th May, 2017)

JUDGEMENT

1. On 26/5/2019 the trial magistrate made a ruling to the effect that stay of execution of decree in the matter granted for the duration of moratorium gazetted on 1/7/2016 by the Managing Trustee Policyholders' Compensation Fund.
2. This was pursuant to a notice of motion dated 5/12/2016 being heard and ruling made thereof.
3. This triggered the filing of the instant appeal in which the appellant set out 4 grounds of appeal namely: -

(1) That the learned Principal Magistrate erred in fact and law in making an order for stay of execution for the duration of the moratorium gazetted by the Managing Trustee Policyholders' Compensation Fund.

(2) The learned Principal Magistrate erred in fact and law in misconstruing the legal principles applicable for grant of the impugned order.

(3) The learned Principal Magistrate erred in fact and law in manifesting bias in the proceedings leading to, and impugned order.

(4) The learned Principal Magistrate erred in fact and law by making an order in excess of jurisdiction.

4. The parties were directed to canvass appeal via submissions.

APPELLANT'S SUBMISSIONS:

5. The appellant submitted that the learned Principal Magistrate erred in fact and law in making an order for stay of execution for the duration of the moratorium gazetted by the Managing Trustee Policyholders' Compensation Fund. Second, that the learned Principal Magistrate erred in fact and law in misconstruing the legal principles applicable for grant of the impugned order.
6. That, the learned Principal Magistrate erred in fact and law in manifesting bias in the proceedings leading to, and the impugned order; and fourth, the learned Principal Magistrate erred in fact and law by making an order in excess of jurisdiction.
7. On whether the lower court misconstrued applicable principles, the appellant contended that, learned Principal Magistrate invoked obviousness as the basis of his decision at page 109 thus:

“Although the plaintiff vehemently opposes the application, it is quite obvious that there cannot be any further proceedings in this matter during the pendency of the moratorium.”

8. The appellant's suit against the respondent was for general damages for pain, suffering and loss of amenities, special damages, costs of the suit and interest as a result of injury sustained by the appellant in an accident while in the course of employment with the respondent, the cause of which accident the appellant attributed to the respondent's negligence.
9. It is the appellant's attempt to execute the decree that precipitated the respondent's application dated 5th December 2016. In the application, the respondent deponed at paragraph 6 of the supporting affidavit that is had obtained an insurance cover from Concord Insurance Company Limited.
10. The evidence in the affidavit shows that vide the Kenya Gazette Notice No. 5083 of 1st July 2016 the Managing Trustee Policyholders' Compensation Fund extended a moratorium that had been issued in relation to Concord Insurance Company Limited, which was under statutory management.
11. Order No. 2 stayed *"all proceedings subsisting against Concord Insurance Company Limited...during the currency of the moratorium declared by the statutory manager on 6th February 2013 and as extended severally..."*
12. Thus it is clear from the Order No. 2 made by the High Court that it was concerned with proceedings subsisting against Concord Insurance Company Limited which was under statutory management. Since the order was intended to safeguard the insurance company during statutory management, it did not concern the respondent except so far as it would have had any claim against its insurer.
13. In relation to the proceedings between the appellant and the respondent, however, it did not give the respondent any immunity or protection.
14. As regards the moratorium declared by the Statutory Manager of Concord Insurance Company Limited, paragraph 2 of the Kenya Gazette Notice at page 16 of the Supplementary Record of Appeal states in part:
- "NOW take further notice that...the Statutory Manager extends the Moratorium on all payments by Concord Insurance Company Limited (under statutory management) to all its policyholders and all other creditors until further notice."**
15. The paragraph shows that the moratorium had been declared in relation to payments by the insurer, which was under statutory management, to all its policyholders and all other creditors. The moratorium did not concern payments of the policyholders such as those due from the respondent as a result of its liability in the present case.
16. In this respect, section 67C (10) of the Insurance Act provides in part that a declaration of a moratorium by a statutory manager relates to *"payment by the insurer of its policyholders and other creditors."*
17. The appellant in this case was neither a policyholder nor creditor of the insurer as he did not fall within neither of the two classes of persons therefore, the moratorium did not apply to him. This position regarding person of the class of the appellant was addressed in *HCC No. 88 of 2012 in the matter of Concord Insurance Company Limited [2014] eKLR* where **Gikonyo J** stated:
- "As a good beginning point, I can pronounce with ease that the interested parties herein are not policyholders of or creditors to Concord Insurance Company.... Section 67C (10) of the Insurance Act was not intended to deny legitimate suitors of their right to institute proceedings for relief against an insured of an insurance company under receivership for tortious acts of or breaches by the insured. The said section is intended to allow the manager to discharge his duties in relation to the revival of the insurance company. In my own view, I think, the protection offered by the moratorium and court orders attendant thereto is to the company from payments by the insurer (company) of its policyholders and other creditors, and not necessarily to the policyholders or other creditors against liability from third parties. Therefore, in so far as the interested parties have cases against the insured, there is nothing to stop them from pursuing the claims to logical conclusion."**
18. It is apparent from the foregoing, that the respondent's claim herein cannot lawfully be subjected to the moratorium which only applies to payments by the insurer, which is under statutory management, to its policyholders and other creditors. That much is also clear from the terms of the Kenya Gazette notice.
19. On that ruling was coloured by bias, the appellant also contends as a ground of appeal that the learned Principal Magistrate erred in fact and law in manifesting bias in the proceedings leading to the impugned order. The record shows that when the respondent filed the application dated 5th December 2016, it was placed before the learned Principal Magistrate.
20. As the record of appeal shows, the learned magistrate was of the view that the court had no jurisdiction and could not, therefore, order stay of execution. Nevertheless, the learned magistrate proceeded to direct that *"the (appellant) cannot proceed with execution in a matter over which this court lacks jurisdiction."*
21. In effect, the court stayed the execution of the decree indefinitely notwithstanding having held that it had no jurisdiction, and it did so without affording the appellant an opportunity to address it on both the question of jurisdiction as well as the legality of the execution.
22. When the action of the court is considered together with the ruling made on 26th May 2017, it becomes apparent that the court had a fixed mind regarding the stopping of the appellant from proceeding with execution.
23. It is in this regard that the learned magistrate's assertion that it is *"quite obvious"* that there could be no further proceedings in the matter during the pendency of the moratorium betrays the bias. As has been noted, the entire ruling does not give any indication as to why the

learned magistrate considered the issue before the court to be “*quite obvious.*”

24. On want of jurisdiction, the jurisdiction to stay proceedings on account of a moratorium issued by the statutory manager of an insurance company is vested in the High Court. This is clear from section 2 of the Insurance Act, Cap. 488 which defines court for purposes of the Act to mean the High Court.

25. The High Court had already defined the scope of proceedings that would be stayed so far as the moratorium was concerned in *HCCC No. 88 of 2013*. In this regard, **Gikonyo J** had stated at the end of paragraph 19 of his ruling thus:

“The orders of the court staying all proceedings against the (insurance) company (as extended by Havelock J) are quite in line with the law and are not set aside, except I am persuaded to set aside the part of order No. 8 which seems to stay all current, existing and or pending proceedings against the policyholders of Concord Insurance Company.” (Italics added).

RESPONDENT’S SUBMISSIONS:

26. Respondent submitted that, it is not in dispute that the respondent was insured by Concord Insurance Co. Limited which is currently under statutory management.

27. This fact and also the fact that there is a moratorium in place staying all suits where Concord Insurance Co. Limited the insurer then it will be a violation of the High Court orders in HCCC No. 180 of 2016 and moratorium gazetted on 1/7/2016 if the court was to order that the respondent can proceed with execution against the applicant who was insured by Concord Instance Co. Limited.

28. It is also important to note that on 18th March 2013 **Hon. Justice Mabeya** in *HCCC No. 88 of 2013* in the matter of *Concord Insurance Company Limited [2014] eKLR* gave orders barring all proceedings of all nature against the policyholders of Concord Insurance Company Ltd during the currency of the moratorium.

29. The very essence of barring and staying proceedings against Concord Insurance Co. Limited during the period of the statutory management is to ensure that there shall be no unrestrained litigation against Concord Insurance Co. Limited which might lead to its possible collapse and rendering of the spirit and intent of section 67C of the Insurance Act a futile exercise.

30. However, **Hon. Justice Gikonyo** in *HCCC No. 88 of 2013* in the matter of Concord Insurance Company (Supra) rendered himself as follows:

“In the face of the orders of the court in force in this case, there is no proceedings, even by way of subrogation that can be conducted against the company.”

31. In the circumstances, the respondent submitted that even execution of proceedings against the respondent cannot proceed during the pendency of the moratorium and urge this honourable court to uphold this basic tenet of law and stay the execution of proceedings herein as prayed.

32. Having regard to Article 50 (1) of the Constitution, it emerges quite vividly that the respondent herein had not been accorded a fair hearing as its previous advocates abandoned the matter as a result of the moratorium which is why the respondent had sought to set aside the judgment and that this matter commences *de novo*.

33. In view of the foregoing, if the appeal is allowed, a great justice would be visited upon the respondent who would have been condemned without a fair hearing and be left exposed to the risks and liabilities for which it had obtained an insurance cover.

34. It should be noted that the trial court, from the perusal of the record of appeal kept an impeccable account of the proceedings of the court. It must be noted that the times when advocate for the appellant attended court are well recorded and so are his submissions. It should also be noted that the issue of bias was not at any time raised with the learned magistrate by the appellant.

35. Lastly, the appellant herein accuses the learned magistrate of bias yet it is the same magistrate that delivered the judgement in its favour. It is thus its humble opinion that the allegations of bias are not well founded and as such the court ought to dismiss the said grounds of appeal.

36. It is its humble submission that this ground of appeal has no legal basis. The learned magistrate drew its jurisdiction to order a stay of execution from Order 22 rule 22 (1) of the Civil Procedure Rules which clearly stated as follows:

“The court to which a decree has been sent for execution shall upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”

37. The Magistrate’s Court has the jurisdiction to order a stay of execution of a decree/judgement. The learned magistrate ordered a stay of execution having been satisfied that there was sufficient cause to do so. He did not adjudicate upon the merits or demerits of the moratorium which is within the jurisdiction of the High Court but rather, the execution of the decree issued by itself.

ISSUES, ANALYSIS AND DETERMINATION

38. After going through the record, pleadings and parties' submissions, I find the issues are; whether **the trial magistrate order impugned was justified and what is the order as to costs?**

39. The appellant's suit against the respondent was for general damages for pain, suffering and loss of amenities, special damages, costs of the suit and interest as a result of injury sustained by the appellant in an accident while in the course of employment with the respondent, the cause of which accident the appellant attributed to the respondent's negligence.

40. It is the appellant's attempt to execute the decree that precipitated the respondent's application dated 5th December 2016. In the application, the respondent deponed at paragraph 6 of the supporting affidavit that is had obtained an insurance cover from Concord Insurance Company Limited.

41. The evidence in the affidavit shows that **vide the Kenya Gazette Notice No. 5083 of 1st July 2016** the Managing Trustee Policyholders' Compensation Fund extended a moratorium that had been issued in relation to Concord Insurance Company Limited, which was under statutory management.

42. Order No. 2 stayed stated in part;

“all proceedings subsisting against Concord Insurance Company Limited...during the currency of the moratorium declared by the statutory manager on 6th February 2013 and as extended severally....”

43. Thus it is clear from the Order No. 2 made by the High Court that it was concerned with proceedings subsisting against Concord Insurance Company Limited which was under statutory management. Since the order was intended to safeguard the insurance company during statutory management, it did not concern the respondent except so far as it would have had any claim against its insurer.

44. In relation to the proceedings between the appellant and the respondent, however, it did not give the respondent any immunity or protection.

45. As regards the moratorium declared by the Statutory Manager of Concord Insurance Company Limited, paragraph 2 of the Kenya Gazette Notice at page 16 of the Supplementary Record of Appeal states in part:

“NOW take further notice that...the Statutory Manager extends the Moratorium on all payments by Concord Insurance Company Limited (under statutory management) to all its policyholders and all other creditors until further notice.”

46. The paragraph shows that the moratorium had been declared in relation to payments by the insurer, which was under statutory management, to all its policyholders and all other creditors. The moratorium did not concern payments of the policyholders such as those due from the respondent as a result of its liability in the present case.

47. In this respect, **section 67C (10) of the Insurance Act** provides in part that a declaration of a moratorium by a statutory manager relates to **“payment by the insurer of its policyholders and other creditors.”**

48. The appellant in this case was neither a policyholder nor creditor of the insurer as he did not fall within neither of the two classes of persons therefore, the moratorium did not apply to him.

49. This position regarding person of the class of the appellant was addressed in **HCC No. 88 of 2012 in the matter of Concord Insurance Company Limited [2014] eKLR** where **Gikonyo J** stated:

“As a good beginning point, I can pronounce with ease that the interested parties herein are not policyholders of or creditors to Concord Insurance Company.... Section 67C (10) of the Insurance Act was not intended to deny legitimate suitors of their right to institute proceedings for relief against an insured of an insurance company under receivership for tortious acts of or breaches by the insured. The said section is intended to allow the manager to discharge his duties in relation to the revival of the insurance company. In my own view, I think, the protection offered by the moratorium and court orders attendant thereto is to the company from payments by the insurer (company) of its policyholders and other creditors, and not necessarily to the policyholders or other creditors against liability from third parties. Therefore, in so far as the interested parties have cases against the insured, there is nothing to stop them from pursuing the claims to logical conclusion.”

50. It is apparent from the foregoing, that the respondent's claim herein cannot lawfully be subjected to the moratorium which only applies to payments by the insurer, which is under statutory management, to its policyholders and other creditors. That much is also clear from the terms of the Kenya Gazette notice.

51. Without looking at other grounds and or/complaints raised by appellant in the appeal, the above holding renders instant appeal successive against the trial magistrate impugned orders. Thus court makes the following orders;

i) The ruling and order of the Honourable D. W. Mburu, Principal Magistrate in CMCC No. 5105 of 2009 at Milimani Commercial Courts delivered on 26th May, 2017) is hereby set aside.

ii) Parties to bear their costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

.....

C. KARIUKI

JUDGE