



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

COMMERCIAL CIVIL CASE NO. 25 OF 2005

CHARLES LUTTA KASAMANI

KASAMANI & COMPANY ADVOCATES.....DECREE HOLDER

VERSUS

UNITED INSURANCE CO. LTD.

(UNDER STATUTORY MANAGEMENT).....JUDGMENT DEBTOR

KCB BANK KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

The Applicant, **CHARLES LUTTA KASAMANI**, Trading As **KASAMANI & COMPANY ADVOCATES**, is seeking a partial lifting of the Moratorium which the Commissioner of Insurance had declared in respect to the Respondent **UNITED INSURANCE COMPANY LIMITED**.

1. Secondly, the Applicant is seeking orders that would lead to the attachment of the Respondent's funds, which are said to be held in the Respondent's bank account at **KENYA COMMERCIAL BANK LIMITED**, Kipande House Branch.
2. Thirdly, the Applicant sought orders for the attachment of the Respondent's moveable and immoveable properties, which are currently protected by the Moratorium.
3. Finally, the Applicant sought orders to compel the Respondent to pay him the sum of Kshs.125,154,405/82. According to the Applicant, the Principal sum was Kshs.27,761,051/=, whilst the rest of the money being sought was made up of interest which had been accumulating at the rate of 12% per annum, since 6th July 2005.
4. In his supporting affidavit, the Applicant confirms that he is aware of the existence of a Committee which was set up by the High Court, with the intention of ensuring that the Respondent's creditors were paid the money that was due to them.
5. It was the Applicant's position that the Committee in issue had failed to achieve progress, because the Statutory Manager and the Shareholders of the Respondent had kept on changing their positions.
6. During the last 13 years when the decretal amount had not been settled, the Applicant says that the following judgments had been entered against him;

a) CONCORD INSURANCE CO. LIMITED VS KASAMANI

& COMPANY ADVOCATES, NBI HCCC NO. 241/2007, in the sum of Kshs.10,202,357/=;

b) NDUNGU TRANSPORTERS VS KASAMANI ADVOCATE, ADVOCATES DCC NO. 271/2018 in the sum of Kshs.2,320,352/=;

c) MARY OSUNDWA VS KASAMANI ADVOCATES, ADVOCATES DCC NO. 151/2007, in the sum of Kshs.4,500,000/=.

7. As far as the Applicant was concerned, the Respondent was guilty of an abuse of the process of the court, through its action of continuing to withhold the decretal amounts that are payable to the Applicant.

8. It is common ground that on 30th November 2017 Justice D.S. Majanja delivered a judgment in favour of the Applicant in the sum of Kshs.27,761,501/= which is payable by the Respondent.
9. The learned Judge also awarded to the Applicant, the costs of the suit.
10. On the Grounds set out on the face of the current application, the Applicant confirms that the costs were taxed on 19th July 2017, and that thereafter, judgment was entered on 30th November 2017.
11. In the circumstances, the Applicant cannot be heard to complain that the Respondent had frustrated the Applicant from realizing the Decree for 13 years. I so say because the Decree arising from a judgment which was entered on 30th November 2017 cannot possibly be 13 years old.
12. On the one hand the Applicant seeks an order for the partial lifting of the Moratorium which had been declared by the Respondent's Statutory Manager, but on the other hand, the Applicant stated, (at Paragraph 10 of his supporting affidavit) that the Moratorium had not been gazetted.
13. If the alleged failure to gazette the Moratorium was meant to imply that the Moratorium was not in place, that would imply that the Applicant would not need any order of the court, to lift the Moratorium.
14. As the Applicant has specifically asked that the Moratorium be lifted by the court, I will proceed on the basis that the Applicant acknowledges the fact that until and unless it was lifted by an order of the court, the Moratorium remains firmly in place.
15. The Applicant submitted that this court is not barred from issuing orders which would satisfy the Decree, just because there existed a Moratorium Order which had been issued by another Court of concurrent jurisdiction.
16. The Respondent's view was that the effect of granting an order herein, for the partial lifting of the Moratorium, constituted a Review or a Variation of an Order which had been issued by another court of concurrent jurisdiction.
17. In my considered view, the Respondent was right, notwithstanding the fact that the Applicant did not expressly seek either a Review or the Variation of the order which granted the Moratorium.
18. It is my further understanding that the Applicant's fundamental complaint is that the existence of the Moratorium had made it impossible for him to recover from the Respondent the money which he was entitled to.
19. In effect, the Applicant considered himself to be aggrieved by the Order which granted the Moratorium.
20. Pursuant to the provisions of **Order 45 of the Civil Procedure Rules** an application for the review of a Decree or of an order, should be applied for at the court which passed the said Decree or Order.
21. This court did not grant the Moratorium which the Applicant now seeks to have partially lifted.
22. The said Order was made in **HCCC NO. 748 OF 2009**.
23. The Applicant has not demonstrated to this court how I could lawfully grant an order in this case, whose impact would directly be felt in the orders which were issued by another court of concurrent jurisdiction.
24. I believe that the reason why the Rules governing the applications for Review of Decrees or of Orders, expressly directed that such applications should ordinarily be made before the court whose order was sought to be reviewed was because no Judge or Magistrate who had a jurisdiction which was concurrent to his or her colleague who had issued an earlier order, has jurisdiction to inquire into the correctness or otherwise of such an order.
25. Of course, **Order 45 Rule 2** of the **Civil Procedure Rules** sets out the circumstances in which an application for review can be heard and determined by a Judge other than the one who made the order which is sought to be reviewed.
26. In the case, it has not been shown that the Judge who granted the Moratorium was no longer attached to the court which granted the said Moratorium.
27. The Applicant has also not demonstrated to this court that the Judge who granted the Moratorium was precluded by the absence or by other cause, for a period of 3 months, from handling an application for the review of the Moratorium, if such an application were to be made in the case in which the Moratorium was granted.
28. For those reasons, I find that I lack the requisite jurisdiction to determine whether or not the order for the Moratorium, (which was granted by another Judge) ought to be partially lifted.
29. The Applicant cited the case of **IN THE MATTER OF STALLION INSURANCE COMPANY (UNDER STATUTORY MANAGEMENT) NBI HCCC NO. 399 OF 2001 (OS)**, as authority for the proposition that a Statutory Manager has a mandatory duty within 12 months, to submit a report on the financial position and management, with recommendations on the revival or the liquidation of the

Company.

30. In this case the Applicant points out that although the Statutory Manager has been in place for over 13 years, he has failed to conclude either the revival or the liquidation of the Company.
31. The requirement that the Statutory Manager should file reports on the status of the company is not synonymous with either the revival or the liquidation of the company.
32. The Applicant has not drawn the attention of the court to any requirement that the revival or the liquidation of a company ought to be concluded within a specified period of time.
33. If the Statutory Manager failed to file reports, it is open to the Applicant to undertake appropriate steps.
34. However, it does appear from the documents made available by the Applicant, that he, (together with other creditors) have been constantly in touch with the Statutory Manager.
35. Of course, for a person whose money is out of reach, delay in the conclusion of the whole process is most unwelcome.
36. The conclusion of the process could be either the revival or the liquidation of the company. In other words, there is no certainty that the conclusion of the process herein would yield payment to all the creditors, in full, or at all.
37. Whether or not the creditors will ultimately receive payment of the sums due to them is an issue which ought to be determined in an expeditious manner.
38. If the application herein was granted, the Applicant would have been elevated to the level of a preferential creditor.
39. Pursuant to **Section 67 C (10) (a)** of the **Insurance Act**;

“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.”

40. The Applicant has not satisfied the court that he ought to be accorded the status of a preferential creditor, whereas all classes of policy-holders and of creditors should, in principle be treated equally during the pendency of the moratorium
41. Whereas a moratorium may be opened up to enable proceedings be instituted, I find that it would be inconsistent with equity and justice to open up a moratorium to enable one creditor or one class of creditors to carry out execution against the assets of the company.
42. In any event, I find no reason to warrant a review of the order which was issued in **HCCC NO. 748 OF 2009**, which specifically stayed all proceedings, taxations, and actions of any sort, against the company.
43. If I were to lift the moratorium, even partially, so as to enable the Applicant proceed with the process of execution, I would have negated the express orders of a Judge of concurrent jurisdiction. I have no mandate to do so.
44. In the result, I find no merits in the application.
45. I also find that, in any event, I had no jurisdiction to grant the substantive reliefs sought.
46. Therefore, the application dated 6th August 2018 is dismissed with costs to the Respondent.

DATED,SIGNED at DELIVERED at KISUMU

this 20th day of **December** 2018

FRED A. OCHIENG

JUDGE