



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 28 OF 2016

**MAUREEN ATIENO OTIENO (*Suing as the administrator of the estate of*
CHARLES OTIENO MIRUKA (deceased).....DECREE HOLDER/APPELLANT**

VERSUS

PHILIP JUMA.....JUDGMENT DEBTOR/RESPONDENT

[Being an appeal from the Ruling of Hon. Mr. H. Adika Senior Resident Magistrate delivered on 22nd April 2016 in the original KISUMU CMCC NO. 312 of 2006]

RULING

By a ruling delivered on 22nd April 2016 the court below dismissed a Notice to Show Cause issued against the Judgment Debtor/Respondent by the Decree Holder/Appellant on the ground that there was still in place a moratorium in respect of the insurer of his motor vehicle. Being aggrieved the Decree Holder/Appellant filed this appeal on the following grounds:-

“1. The learned trial magistrate grossly erred in both law and fact in failing to find that the Respondent failed to show cause why execution should be issued against him. to not issue

2. The learned trial magistrate erred in fact by failing to arrive at a conclusion that there was no evidence placed before it that the suit motor vehicle KAT 605H owned by the Respondent was insured by Blue Shield Insurance Co. Ltd. (under receivership).

3. The learned trial magistrate grossly misdirected himself in considering irrelevant issues and making contradictory orders.

4. The learned trial magistrate failed to appreciate the fact and law that Blue Shield Insurance Company (under receivership) was not a party in the proceedings before it and any moratorium placed by its statutory manager did not extend to the appellant who is not the insurance company's director.

5. The learned trial magistrate grossly misdirected himself on the law by failing to appreciate that numerous decisions from the high court had found that any moratorium declared by the statutory manager of Blue Shield Insurance Company suits against policy holders was clearly ultra vires subsection (10) of section 67C of Cap 487.

6. The ruling was against the weight of the submissions and authorities the learned magistrate.

placed before

7. The learned trial magistrate erred in both law and fact in failing to consider the Defendant's submissions while arriving at the decision.”

This appeal is not opposed. In fact the Advocates for the Judgment Debtor/Respondent did not attend the hearing of the appeal despite being duly notified as shown in hearing notice annexed to the Affidavit of service dated 16th January 2017.

Mr. Odeny for the Decree Holder/Appellant submitted that the Decree Holder/Appellant's attempt to execute the decree in the lower court was frustrated by the Judgment Debtor/Respondent on the ground that there was a moratorium and a stay of execution in respect of Blue Shield Insurance Company. That however he did not demonstrate firstly that he was insured by Blue Shield Insurance Company and secondly that there was a judgment against Blue Shield Insurance Company in respect of this decree. Counsel also submitted that whereas the trial magistrate relied on the moratorium the same expired on 15th September 2012 and there was nothing to show it was still in force when the ruling was delivered. He urged this Court to be persuaded by the decisions of Waweru J in **Peris Onduso Omondi V. Tectura International Limited [2013]eKLR** and in **HCC No. 465 of 2011 (O.S) Lydia Wachira V. Florica Nicole Muturi and Harun R. Muturi.**

I have perused the lower court file. Judgment was entered for the Decree Holder/Appellant against the Judgment Debtor/Respondent for Kshs.1,320,000/=. The insurance company was not a party in the suit and as submitted by Counsel for the

Decree Holder/Appellant there is no indication that a declaratory judgment was obtained against it. Just like in the two decisions of Waweru J cited above the Judgment Debtor/Respondent has not demonstrated that he was a policy holder of the Insurance Company in whose favour the moratorium or the stay of execution was issued such as would entitle him to enjoy the terms of that moratorium or stay. Secondly there was no proof that by the time the lower court delivered its ruling that moratorium or the stay of execution were still in place. Those issues have not been clarified even in this appeal. Accordingly I find merit in this appeal. The ruling of the lower court is set aside and the Decree Holder/Appellant may proceed with execution but subject to fulfillment of the condition imposed by Lucy Gitari the trial magistrate in the judgment dated 18th October 2012. The costs of this appeal shall be met by the Judgment Debtor/Respondent. It is so ordered.

Signed, dated and delivered at Kisumu this 23rd day of February 2017

E. N. MAINA

JUDGE

In the presence of:-

Mr. Siganga for Decree Holder/Appellant (Holding brief for Masese Advocate)

N/A for Judgment Debtor/Respondent

Otieno – Court Assistant