



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO.43 OF 2012**

**(CORAM: GIKONYO J)**

**MUTHURI NTARA.....1ST APPELLANT**

**JULIUS KIRIMI GITONGA.....2<sup>ND</sup> APPELLANT**

**Versus**

**FRANCIS MWORIA IGWETA.....RESPONDENT**

***(Appeal from the Ruling of Hon Onyango made on 27<sup>th</sup> April 2012 in Meru CMCC NO 233 of 2005)***

**JUDGMENT**

**Appeal from orders**

[1] This Appeal arises from the Ruling of Hon Onyango made on 27<sup>th</sup> April 2012 in Meru CMCC NO 233 of 2005 in which the Learned Magistrate dismissed an application for stay of execution dated 2<sup>nd</sup> February 2012. The Appellants proffered the following Grounds of Appeal:

1. ***The Learned Magistrate erred in law and fact in failing to find that the Appellants were entitled to protection from execution pursuant to orders issued by the High Court in HCCC NO. 465 of 2011 (OS) at Milimani Law Courts.***
2. ***The Learned trial Magistrate erred in law and fact in finding that the order relied on was not certified and thus did not constitute a court order.***
3. ***The Learned Magistrate erred in failing to take judicial notice of HCCC NO.465 of 2011 (OS) at Milimani Law Court and find that the same was binding on the lower court.***

**Brief facts**

[2] In summary, the Respondent is the plaintiff in Meru CMCC NO 233 of 2005 and holder of a judgment in the sum of Kshs 255, 656. The said judgment was entered into against the Appellants on 9<sup>th</sup> August 2011. The Respondent obtained warrant of arrest in execution of the decree against the Appellants. To obviate the execution, the Appellants applied to the trial court for stay of execution via Application dated 2<sup>nd</sup> February 2012. The major ground presented as a basis for stay execution of the decree in the lower court was that a moratorium staying all proceedings in respect of claims covered by Blue Shield Insurance Company had been declared in HCCC NO.465 of 2011. The trial magistrate considered the application and dismissed it on 27<sup>th</sup> April 2012 thus provoking this Appeal.

**SUBMISSIONS BY PARTIES**

## **By the Appellants**

[3] The Appellants submitted that the parties in this Appeal were the litigants in Meru CMCC NO 233 of 2005- a claim arising out of an accident. They stated that there was no dispute that the subject motor vehicle was at all material times insured by BlueShield Insurance Company and that judgment was entered against the Appellants jointly and severally. The Appellant submitted that execution against them was initiated after the insurer was placed under statutory management. Again, they submitted that they moved the lower court for stay of execution on the basis that the insurer has been placed under statutory management. They viewed the fact of statutory management of the insurer as a matter of public notoriety which the court ought to have taken judicial notice of, and, therefore, the finding by the Learned Magistrate was erroneous. Consequently, they submitted that the grounds set out in the Memorandum of Appeal were meritorious and urged the court to allow the appeal.

## **By the Respondent**

[4] The Respondents opposed the appeal. He argued that this Appeal is incompetent and an abuse of the court process. He cited five reasons in support of that submission; (1) there had been no appeal against the decree by the lower court; (2) there was no evidence before the trial court of the existence of order proclaiming a moratorium shielding the Appellants from paying the decretal amount; (3) Milimani HCCC NO.465 of 2011 only barred the policyholders and creditors of Blue Shield Insurance Company from making or enforcing claims; and (4) that the Respondent was not a party in Milimani civil case No. 465 of 2011 and he could not, therefore, be judged without being heard. He emphasized that; even if such order existed it could not bind the Respondent as he was not privy to the contract between the Appellant and Blue Shield Insurance Company.

[5] The fifth argument by the Respondent was that an order refusing a stay is not appealable as of right as it was not one of the orders set out in section 75 (1) of the Civil Procedure Act; the Appellant should have sought and obtained the leave of the court to appeal against such order refusing a stay. According to the Respondent, without such leave, the Appeal is incompetent and should be struck out.

## **DETERMINATION**

[6] Upon careful and meticulous consideration of this Appeal and the rival submission by the parties, one thing is clear; that the Appeal herein emanates from a Ruling of Hon Oyango in which he dismissed the Appellants' application for stay of execution on 27<sup>th</sup> April 2012. Immediately, Section 75 (1) of the Civil Procedure Act which deals with "**appeals from orders**" as well as Order 43 of the Civil Procedure Rules comes to play. In accordance with the law, an Appeal against an application for stay of execution does not lie as of right within the meaning of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules as it not among those provided for in the section 75 and Orders 43 of the Civil Procedure Act and Civil Procedure Rules, respectively. It is clear from the record that the Appellants did not seek leave of the court before filing this Appeal. See the case of **PROTEIN & FRUITS PROCESSORS LIMITED vs. ENKASITI FLOWER GROWERS CIVIL APPEAL (APPLICATION) No. 27 of 2006**, where it was held as follows:

***"Section 75 of the Civil Procedure Act and Order XLII of the Civil Procedure Rules list the orders out of which appeals lie to this Court as of right. In any other case under Chapter 21 Laws of Kenya not provided for, an appeal only lies with leave of the Court. Such leave must be sought and obtained in the Court of the first instance. If the leave is refused then this becomes a ground of appeal.***

[7] Based on the above this appeal is, therefore, incompetent. I could be wrong. Nonetheless, the Appellants argued substantial questions of law which I wish to determine. First, the Appellants have argued that the trial court should have taken judicial notice of HCCC NO.465 of 2011 (OS) at Milimani Law Court and ought to have found that the order was binding on the court. I am perturbed that the Appellants did not place a duly certified order before the trial magistrate. As a matter of fact and law, a Moratorium is declared by the statutory manager; it is for a specified period of time and applies within

boundaries defined in law. Therefore, the specific order or proceedings of the court should be properly laid before the trial court if the court is to act on it in relation to the proceedings before it. As the Appellants wished the trial magistrate to take cognizance of the order in HCCC NO 465 OF 2011 and to stay execution, under section 43 of the Evidence Act, they ought to have proved that by virtue of the said order the court should stop execution. Again, the existence of the order in question or its application or relevant to the proceedings before the trial court was in issue before the trial court. I have also perused the purported order produced before the trial and it was a notice by Blueshield Insurance Company to its policyholders informing them of a declaration of a moratorium on all legal proceedings against the Insurance Company. It is not a certified court order on which a court of law would act or take judicial notice of. Accordingly, there was no certified court order before the trial court and so the trial magistrate rightly rejected the purported court order. Therefore, I do not think in such circumstances it would be prudent to assert that the trial magistrate ought to have taken judicial notice of HCCC NO.465 of 2011 (OS) at Milimani Law Court and to find that the order was binding on the court in the absence of the specific order before the court and proof thereof. I reject the arguments by the Appellant on that point and that ground of appeal fails.

[8] Second, the Appellants urged that the fact that insurer herein had been placed under statutory management was a matter of public notoriety of which the court ought to have taken judicial notice and order a stay of execution. This argument is related to the one I have dealt with already except it has another important aspect which I will discuss. I understand the Appellants to be saying that; by virtue of the fact that the insurer was placed under statutory management and a moratorium had been declared on all suits against the insurer, a stay of execution of decrees held by third parties against the insured should be a matter of course. They argued that a moratorium staying all proceedings in respect of claims covered by Blue Shield Insurance Company was issued in HCCC NO.465 of 2011. The question is:

**1. Whether the Appellants were entitled to protection from execution pursuant to orders issued by the High Court in HCCC NO. 465 of 2011 (OS) at Milimani Law Courts.**

I reckon that the Respondent is neither a policy holder nor a creditor of Blueshield Insurance Company. He is merely a decree-holder against the Appellants jointly and severally. Therefore, a moratorium issued to protect the Insurance Company whose fortunes have now dwindled; leading to statutory management does not operate as stay of execution of decrees against the insured. A moratorium is declared by the Statutory Manager under Section 67 c (10) of the Insurance Act and it protects the insurer against claims by the policyholders and creditors of the insurer. Accordingly, mere declaration of a moratorium does mean an automatic stay of execution against the insured; the insured must prove before the trial court upon lawful grounds that a stay of execution is merited. Courts have had opportunity to consider the effect of a moratorium on third parties' suits and decrees. I am particularly concerned that **IN THE MATTER OF: BLUESHIELD LIMITED (UNDER STATUTORY MANAGEMENT) CIVIL SUIT 465 OF 2011 (O.S.) Justice H.P.G Waweru** said the following about the third party in the suit:

***“.....Her suit is against a tortfeasor in negligence. She has no direct connection, as policy holder or creditor, to Blue Shield.***

***10. The moratorium declared by the Statutory Manager, in so far as it extended to the interested party's suit, was clearly ultra vires subsection (10) of section 67C of Cap 487.***

Justice Waweru also stated in the same case thus:

***Similarly, the order of this court of 28<sup>th</sup> October, 2011, in so far as it affected the 1<sup>st</sup> interested party's case .....was made without jurisdiction. The order was made ex parte without the 1<sup>st</sup> interested party being given an opportunity to be heard on the matter. Now that she has been heard, the order is clearly unlawful and was made in error. It must be set aside in so far as it affects her suit to enable her to pursue the tortfeasor. The obligations of Blue Shield to the 2<sup>nd</sup> and 3<sup>rd</sup> interested parties (policy holders) under their contract of insurance cannot concern the 1<sup>st</sup> interested party.***

[9] It should be appreciated that the Respondent's suit and decree is not a declaratory suit or decree against the insurer. It is a decree against the tortfeasor. Based on these brutal echoes of the law, the appeal would still fail. *For all the above reasons this Appeal is accordingly dismissed with costs to the Respondents. It is so ordered.*

**Dated, signed and delivered in open court at Meru this 26<sup>th</sup> day of May 2016**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Lekoona advocate for the defendant

Non appearance for the appellant

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**F. GIKONYO**

**JUDGE**