



**IN THE HIGH COURT AT NAIROBI**

**MILIMANI LAW COURT**

**JUDICIAL REVIEW DIVISION**

**MISC. APPLICATION NO. 1434 OF 2004**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE COMMISSIONER OF INSURANCE ..... RESPONDENT**

**AND**

**CHIEF MAGISTRATE’S COURT, MILIMANI NAIROBI .....1<sup>ST</sup> INTERESTED PARTY**

**FAIRLANE SUPERMARKET LTD .....2<sup>ND</sup> INTERESTED PARTY**

**UNITED INSURANCE COMPANY LIMITED .....3<sup>RD</sup> INTERESTED PARTY**

***EX PARTE***

**MARTIN K. NGARI**

**JUDGMENT**

**Introduction**

1. The *ex-parte* applicant’s (“the applicant”) motor vehicle registration number KYK 149 Toyota was involved in a road traffic accident on 8th February 1997. At the material time it was covered by insurance policy number 12NMCP17443 issued by the 3<sup>rd</sup> interested party (“United Insurance”). The applicant was sued by the 2<sup>nd</sup> interested party (“Fairlane”) in ***Milimani SPMCC NO. EJ 85 OF 2000*** for recovery of damages wherein judgment was entered against him.
2. The applicant alleges that by failing to ensure that his claim is settled, United Insurance and Commissioner of Insurance (“the Commissioner”) have failed to comply with the mandatory provisions of **section 203(1) and (2)** of the ***Insurance Act*** which state as follows;

*203. (1) Where the claimant has submitted all the relevant documents, every insurer shall, in respect of claims arising out of policies of insurance issued by it—*

*(a) admit or deny liability;*

(b) determine the amount due;

(c) establish the identity of the claimant; and

(d) pay the claim,

*within ninety days of the date of the reporting of the claim or where the determination of liability is by a court, within ninety days of such determination:*

*Provided that if, for any reason, the insurer is unable to pay the claim within the period specified in this subsection, the insurer shall apply to the Commissioner for extension of time, and the Commissioner may grant extension for a period not exceeding thirty days.*

*(2) Where an assessment of claim has been carried out, a copy of the assessment report shall be made available to the claimant.*

3. The petitioner contends that he complied with his obligations to United Insurance as provided by the ***Insurance (Third Party Risks) Act (Chapter 405 of the Laws of Kenya)*** and he is therefore entitled to have his claim settled.

### **Applicant's Case**

4. The applicant has now moved the court by the Notice of Motion dated 13th June 2005 where he seeks the following orders:
  - a. *An order of mandamus by way of judicial review do issue directed to the respondent to perform his mandatory duty under the law and cause the 3rd interested party to forthwith settle the decree arising from Milimani SPMCC No. EJ 85 of 2000.*
  - b. *An order of prohibition do issue directed to the 1st interested party prohibiting it from issuing warrants and/or proceeding in any way with the process of execution in EJ 85 of 2000.*
  - c. *Those costs of this application be provided for.*
5. The application is supported by the applicant's affidavit sworn on 14<sup>th</sup> June 2005 and the statutory statement dated 6<sup>th</sup> June 2005. The application is made on the grounds that Fairlane, the judgment creditor, commenced execution proceedings and that the Commissioner and United Insurance have declined and/or refused to perform their mandatory duty despite the fact that the applicants have complied with his obligations under the ***Insurance (Motor Vehicle Third Party Risks) Act***. The applicant laments that in the event the orders sought are not granted the principle of natural justice will be negated.

### **Respondent's and Interested Parties Case**

6. The 1<sup>st</sup> interested party filed grounds dated 24<sup>th</sup> February 2014 in opposition of the application. Counsel for the Attorney General has submitted that the Court cannot be implicated for any failures of the applicant and his insurer's obligations under the policy. She submitted that the matter the Court is entitled to deal with the application for execution before the court in accordance with well-known procedures and principles to be found in the ***Civil Procedure Act*** and ***Rules*** and hence the order of prohibition cannot issue against it.
7. Fairlane, the judgment creditor, is opposed to the application on the ground that it is exercising its right to recover its debt under a judgment. It submits that it is not party to the contract of insurance between the applicant and United Insurance. The judgment creditor invited the court to have regard to the fact that the primary claim was a material damage claim which is outside the purview of the provisions of **section 5(b)** of the ***Insurance (Motor Vehicle Third Party Risks) Act***. It contends that the judgment creditor cannot enforce any judgment against United Insurance since

the claim is not one in respect of death or injury under **section 10** of the *Act*.

8. It is not in dispute that on 15th July 2005, Kenya Reinsurance Corporation Limited was appointed by the Commissioner as the Statutory Manager for United Insurance. The application is therefore opposed by the Statutory Manager through the replying affidavit of Johnson Githaka, the Managing Director of Kenya Reinsurance Corporation Limited, sworn on 22nd September, 2005. He depones that the Statutory Manager in exercise of its powers conferred by **section 67 C (10)** of the *Insurance Act (Chapter 487 of the Laws of Kenya)* declared a moratorium on the payments due from United Insurance to its policy holders and all others creditors for a period of twelve (12) months. As the moratorium is still in place, the Statutory Manager states it cannot meet the applicant's claim. The Statutory Manager relies on the case of *Stephen Kiarie Chege v Insurance Regulatory Authority and Others Nairobi HC Misc. Appl. No. 601 of 2009 [2009]eKLR* where the court held that a moratorium suspended all payments to policy holders and creditors and the court cannot compel the Statutory Manager to settle claims under **section 10** of the *Insurance Act*.
9. The Statutory Manager also contends that the application is belated in so far as it seeks to compel the Commissioner to perform his statutory mandate under the *Insurance Act* as the Commissioner has already performed his duty by appointing a Statutory Manager. He contends that an order directed to the statutory manager would defeat the statutory protection afforded by the moratorium and expose the United Insurance to claims that the moratorium was intended to shield.

### **Determination**

10. The application before the court is one for orders of prohibition and mandamus and the decision is to be determined on first principles. In *Kenya National Examinations Council v Republic ex-parte Gathenji and Others CA Civil Appeal No. 266 of 1996 [1997]eKLR*, the Court of Appeal addressed the scope of an order of mandamus, "*What is the scope and efficacy of an ORDER OF MANDAMUS? ..... "The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual." ..... [A]n order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."*
11. On the facts of the case, can the Court compel the Commissioner of the insurance to perform its statutory duty to compel the Statutory Manager to settle the judgment creditor's claim? The relationship between the applicant and United Insurance was based on a contract governed by the applicable policy and the provisions of the *Insurance (Motor Vehicles Third Party Risks) Act*. The duty of the United Insurance to settle any claim referred to under **section 203** of the *Insurance Act* is to be read within the context of *Insurance (Motor Vehicles Third Party Risks) Act* which provides a framework for settlement of third party insurance claims. United Insurance and the Commissioner were not parties to the suit before the Magistrate's Court and their liability to the applicant was not an issue nor did it give rise to the decree which is sought to be enforced. Furthermore, the decree arises from a material damage claim which is outside the purview of the *Insurance (Motor Vehicles Third Party Risks) Act* and which United Insurance would not be required to settle. In the circumstances no public duty has been demonstrated to warrant the grant of an order of mandamus against the Commissioner.
12. I also hold that in view of the moratorium declared by the Statutory Manager by virtue of **section 67C** of the *Insurance Act*, the Court cannot therefore compel the Commissioner to direct the

Statutory Manager to pay the applicant claim in the face the moratorium.

13. The Court of Appeal also discussed the scope of the order of prohibition in ***Kenya National Examinations Council v Republic ex-parte Gathenji and Others (supra)***, it stated, “What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings ....”
14. Transposing these *dicta* to the present case, I hold that the applicant has not shown that the Magistrate’s Court in its proceedings and judgment acted *ultra vires*, breached the rules of natural justice or that the decision was *Wednesbury* unreasonable or that there is a reasonable basis for apprehending that the Court will act contrary to the law in order to attract an order of prohibition.

### **Disposition**

15. The upshot of my findings is that the orders of mandamus and prohibition sought by the *ex-parte* applicant cannot be granted. The Notice of Motion dated 13<sup>th</sup> June 2005 is dismissed with costs.

**DATED and DELIVERED at NAIROBI** this 21<sup>th</sup> day of March 2014

**D.S. MAJANJA**

**JUDGE**

Ms W.G. Wambugu instructed by Wambugu and Company Advocates for the *ex-parte* applicant.

Ms Chimau, Litigation Counsel, instructed by the State Law Office for the 1<sup>st</sup> interested party.

Mr Wambua instructed by B. Mbai and Associates Advocates for the 2<sup>nd</sup> interested party.

Ms Atina instructed by Milimo, Muthomi and Company Advocates for the 3<sup>rd</sup> interested party.