



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**H.C.C.A. NO. 127 OF 2003**

**LESIIT J.**

**ADIEL NYANGE.....APPELLANT**

**VERSUS**

**ANDRIANO NJOKA M'MUGO.....RESPONDENT**

**RULING**

The application dated 5/10/2010 brought under Order XLIV Rule I of the Civil Procedure Rules and section 3A, Section 63(e) and section 80(a) and (b) of the Civil Procedure Act, Cap 21 Laws of Kenya and all other enabling provisions of Law.

The prayers sought are:

- (i) That this application be certified urgent and service be dispensed of in the first instance.
- (ii) That this honorable court be pleased to review and set aside and/or vacate its order made on 20/9/2010 dismissing the applicant's application dated 2<sup>nd</sup> June 2005.
- (iii) That upon granting order (2) above this honourable court be pleased to grant the order that the Recorded of Appeal dated 2<sup>nd</sup> June 2005 filed by the appellant/applicant be reinstated and heard after the expiry of the moratorium (16<sup>th</sup> December, 2010)
- (iv) That such orders as shall be just and expedient be made.
- (v) That the costs of this application be provided for.

They are supported by the following grounds:-

(a) That there is an order and a gazette notice dated 16/6/2010 clearly indicating that the order of 748/09 and the moratorium for United Insurance Company under Statutory management has been extended and stay in all proceedings.

(b) That it is in the interest of justice that the orders pleaded herein be granted as prayed. It is supported by the affidavit of even date sworn by S.W. Ndegwa Advocate for the applicants. Para 3,4, and 5 of the supporting affidavit states:

3. that the respondent filed an application on the 2<sup>nd</sup> April 2008 but was only served upon the appellant on the 10<sup>th</sup> May 2010 together with hearing notice that hearing of the same is fixed for 20<sup>th</sup> September 2010.

4. That on the same day 20<sup>th</sup> September, 2010 the matter was listed before Justice Mugo in court 2 and we instructed Mr. Mwangela Advocate to hold our brief. Mr. Mwangela applied for adjournment on the ground that the matter arises out of policy of United Insurance Co. Limited of which there is moratorium in force and a High Court Order extended the same for six months from 16<sup>th</sup> June, 2010.

5. that the Honourable Justice Mugo dismissed our application on the ground that the Respondent filed an application on the 2<sup>nd</sup> April, 2008 but no replying affidavit was filed up to 20<sup>th</sup> September, 2010 without considering the following; (i) the same application was only served upon the appellant on the 10<sup>th</sup> May, 2010, ii) Mr. Ndegwa was instructed only on 20<sup>th</sup> September, 2010 iii) and moratorium was still in force.

There is also a supplementary affidavit sworn by the appellant/applicant in which it is clarified that the moratorium which prevented the appellant from prosecuting his appeal affects all stake holders including all claimants which includes the applicants against policies issued by United Insurance Company. The applicant explains that he was also affected because he was a claimant against the said insurance company. The application was opposed by the respondent filed a replying affidavit was sworn by the respondent in which the respondent deposes that he was not privy to the contract of insurance between the applicants insurer and the United Insurance Company. It deposes further that the Moratorium was ultra vires if it purported to bide any persons other than the insurance policy holders and their creditors.

There is a Notice of Appointment on record dated 20<sup>th</sup> September 2010 which shows applicant's advocate was instructed that day to appear for the applicant. The record also shows that in deed Mwangela also applied in court on 20<sup>th</sup> September 2010 to seek adjournment on behalf of Mr. Ndegwa while he sought adjournment on grounds of extension of the moratorium issued in regard to United Insurance Company. Annexed to the affidavit is an advert in a local daily showing extension of the moratorium for six months from 16<sup>th</sup> June 2010.

The actual order of the court in which the original order of moratorium was issued is also annexed under Paragraph 3 and 4 all proceedings against United Insurance Co. and all its policy holders at whatever stage were stayed so long as the Moratorium will bring under order paragraph 5 the running of time for the purpose of any law of Limitation were also stayed during the same period.

The police abstract annexed to Record of Appeal herein shows that the accident vehicle was insured by United Insurance Co. There is prima facie proof that the running of time under any Law of Limitation were stayed in respect of claims against the United Insurance and or its policy holders who include the applicant herein.

I appreciate that Mr. Ndegwa advocate is hazy regarding dismissal ordered by the learned judge on 20<sup>th</sup> September 2010. Nonetheless he is right regarding the effect of the order of the learned Judge made on 20<sup>th</sup> September 2010.

The learned Judge allowed the respondent's application of 2<sup>nd</sup> April 2008 in effect of the order dismissed the applicants appeal for lack of prosecution within the prescribed time. The prescribed period is the same period stayed by the order of Kimaru J. as annexed herein at the time United Insurance was placed under Statutory Management and extended thereafter from time to time. Clearly there is an error on the record and this court made a mistake in allowing the application. I find in the circumstances that my learned sister's order of 20<sup>th</sup> September 2010 was made in error and ought in the circumstances to be reviewed and set aside.

Having come to the conclusion I have of this application, I will allow the applicant's application dated 5<sup>th</sup> October 2010 in terms of prayers 2, 3 and 5 of the application as follows:-

**1. An order for review and setting aside of the order of this court made on 20<sup>th</sup> September 2010 dismissing the applicants appeal be and is hereby issued.**

**2. Costs of the application abide the outcome of the appeal.**

Dated Signed and delivered at Meru this 26<sup>th</sup> day of November 2010.

**LESIT, J**

**JUDGE**

In the presence of the parties  
Kiriimi – Court Clerk.  
Mr. Nyaga Nyamu for appellants/applicant  
Mr. Riungu for respondent

**LESIT, J**  
**JUDGE**