



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Misc. Appli. 426 of 2008**

**KENNEDY KINYA HIUKIA.....PETITIONER**

**Versus**

**THE STATUTORY MANAGER**

**UNITED INSURANCE CO. LTD & 3 OTHERS.....RESPONDENT**

**RULING**

The Applicant herein, Kennedy Kinya Hiukia filed the Chamber Summons dated 16<sup>th</sup> July 2008 seeking leave of this court to commence Judicial Review proceedings against the Respondents who are the Statutory Manager, United Insurance Co. Ltd., the Insurance Regulatory Authority (incorporating the Commissioner of Insurance), the Senior Principal Magistrate's Court Murang'a and the Attorney General, the 1<sup>st</sup> and 4<sup>th</sup> Respondent respectively. Joyce Wanjeri Ngechu, Jim Geoffrey Gatimu and Edward Kamau Macharia were enjoined to this application as Interested Parties. The Applicant seeks orders that the court grant him orders of mandamus to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to perform their duty under S. 67 (c) 4) of the Insurance Act in respect of HCC 93/04 CMCC 271/04 and P.M.C. 275/04 all of Muranga court. 2<sup>nd</sup>ly that the court do grant leave to the Applicant to apply for orders of certiorari to quash the warrants issued by the court in the above named cases and that the said leave do operate as stay of execution. When the Applicant came before the court, the court directed that the Chamber Summons be served for hearing interpartes. The Chamber Summons is supported by an affidavit sworn by the Applicant on 16<sup>th</sup> July 2008 and a statement dated 14<sup>th</sup> July 2008. The only ground upon which the application is brought is that the warrants of arrest issued against the Applicant are in disregard of the express provisions of the law relating to settlement of insurance claims.

Mr. Bitta Counsel for the 2<sup>nd</sup> to 4<sup>th</sup> Respondent filed grounds of opposition dated 28<sup>th</sup> July 2008. The 2<sup>nd</sup> Interested Party also filed a Replying Affidavit dated 29<sup>th</sup> July 2008 opposing the motion. The thrust of the Applicant's case is that the Applicant was sued in 93/04, 271/04 and 275/04 Muranga (KK1) arising out of an accident involving Motor vehicle KAM 622N which was insured by United Insurance, Co. Ltd. as per certificate of Insurance 'KK 11'. The Insurance Company was put under statutory management on 15<sup>th</sup> July 2005 and the moratorium has been extended severally. The notice is KK 111. That it is the Insurance Company that should have settled the decretal sum in terms of S. 67 (c) (4) and also Sections 10 (2) 203 (1) and (2) of the Third Party Insurance Act. That since the insurance company became insolvent, the burden to settle the claim should not have been laid on the policy holder compensation fund. That in a similar situation the statutory manager of Ivesco Assurance Co. Ltd moved the court and obtained a stay of execution of the entire proceedings. That the warrants issued against him should therefore be quashed.

Mr. Ndegwa Counsel for the Applicant urged that he has looked at the practice in other jurisdictions regarding such situations. Counsel referred to an Article: **INTERNATIONAL RESPONSES TO INSURER INSOLVENCY** by Peter Axleford, Ruane, Axleford and McCommack which analyses at the position in Australia, the United Kingdom and the USA. In Australia where Insurance is compulsory and

Insurer has failed to meet its obligation, the Government has stepped in to pay the claims whereas in United Kingdom a fund has been established to settle such claims and that the United States has an Act similar to ours and where an insurance company goes under, the statutory manager has to move the court to stay all claims or executions. That the statutory manager therefore should have moved under S. 67 C (4) to discharge his duty to the public. He urged the court to grant leave and the same to act as stay.

Mr. Bitta Counsel for the Respondent opposed the Chamber Summons. He filed grounds of opposition on 30<sup>th</sup> February 2008 in which he states that the application is incompetent because the Applicant did not file a statement and a verifying affidavit. That the Applicant seeks leave to quash non existent proceedings as there is no Chief Magistrates Court in Muranga.

The Respondents also raised objection that the Applicant seeks to establish the issue of liability yet that should be done in a civil case as Judicial Review is not a civil jurisdiction. That the case that was heard by Justice Ang'awa involved similar issues and the question of liability was determined.

The 2<sup>nd</sup> Interested Party filed a replying affidavit dated 24<sup>th</sup> July 2008 opposing the Application. He urged that the Applicants have not shown what they have been doing for the last 2 years. since the statutory manager declared a moratorium. He urged the Judgment debtor to appeal or satisfy the decree. That there has been inordinate delay in bringing this application and that it is res judicata the same issues having been determined in 1645/05. That in CA 700/1998 **OMEGA CREDIT LTD V MT. KENYA ROSES LTD**, the court held that a claim that one satisfies a decree does not amount to violation of constitutional rights. He urged the application to be dismissed.

Having heard all Counsel on the application I am satisfied that so many issues have arisen and, it is evident that the Applicant has an arguable case; ie whether this court is trying to establish issue of liability, whether the Respondent has failed in its duty to protect the insured persons after an Insurance Company goes under receivership and whether the Respondents are in breach of any of the provisions of the Insurance Act. I do take into account the fact that similar matters were heard in which Justice Angawa found in favour of the Applicants but the Court of Appeal stayed the judgment and it is still the subject of appeal.

I have considered the authorities produced by the Applicant's Counsel on the prevailing situations in other jurisdictions in cases where the Insurance Company is under receivership; The Applicants' insurance was compulsory. The question is whether we should go the same way as the United Kingdom or United States of America and what is our law? It is noteworthy that the matter that was determined in favour of the Plaintiffs by Justice Angawa in HCC 1665/05 is stayed and subject of appeal. For the above reasons I think that the execution of the Applicants should be stayed for the court to look at the Applicant's grievances again. I will therefore direct that leave so granted do operate as stay. Prayers 2, 3 & 4 of the chamber Summons are therefore granted. Notice of Motion be filed and served within 14 days hereof.

Once the Notice of Motion is filed the same be mentioned for directions as to the hearing.

Costs to abide the Notice of Motion.

Dated and delivered this 27<sup>th</sup> day of August 2008.

**R.P.V. WENDOH**

**JUDGE**

Present:

Mr. Ndegwa for Applicant

Mr. Bitta for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent

Mr. Kinyanjui for 1<sup>st</sup> Respondent

Daniel: Court Clerk