

IN THE HIGH COURT OF KENYA AT NAIROBI

Misc Application 1385 of 2005

KENNEY JADEN KWAJI.....PLAINTIFF

VERSUS

THE MINISTER FOR FINANCE & 3 OTHERS.....DEFENDANT

RULING

This Ruling relates to an application dated and filed on 20.09.2005.

The application raises important Constitutional issues arising directly from the collapse of the United Insurance company Ltd (now under statutory management). The issues concern the fundamental rights and freedoms of the individual.

For the creditor, he has a fundamental right to be paid and enjoy the fruits of his judgment accruing from the injuries or damage suffered by him as a result of the accident he may have suffered while being a passenger in the insured motor vehicle, or merely being a third party injured by the insured motor vehicle.

On the flip side of this coin, is the debtor, or the judgment debtor who says or admits that he insured his motor vehicle with the collapsed Insurance Company who by law is bound to satisfy any judgment entered against the debtor under circumstances covered by the insurance policy. He says that the insurance company should meet the liability if the Insurance Company has collapsed and is unable to meet the liability then the state should do so, because it is the state which has caused him to insure with the collapsed company by allowing or licensing it to carry out insurance business. More so because, the state has created a supervisory agency called the Commissioner of Insurance who is by law required to ensure that every insurance company is managed and operated in a financially viable manner. He cannot be subjected to arrest and committal to civil jail for errors which are essentially those of the state.

So this too is a fundamental right equally protected under the Constitution. So where do we draw the line?

It is a balancing act. The primary liability in my view is that of the insured. There is a valid decree of court against him or it, and so long as that decree subsists he is liable to satisfy it. The contract of insurance is between him (the insured) and the Insurer(the Insurance company). If the insurance company has collapsed he must carry that risk in a free enterprise system such as ours, the insurer was a company of his choice. If he had insured with a better managed Insurance Company, the risk he took could have been absorbed. He probably insured in good faith, believing that since the insurer was licensed by the state, it was a good bet to insure with. He lost. His only right is to prove the loss or debt (represented by the decree against him) with the statutory manager, receiver or liquidator.

With this background therefore I am unable to grant an order for stay of execution as prayed in paragraph 3 of the Applicants Chamber Summons first referred to above.

I do however grant prayers Nos. 1, 2, and 4 sought in the said application and direct that the intended Respondents (I prefer to call them such, as I am not sure that they are proper parties to this action) and the Interested Party be served with the application, and this Ruling within (7) days of today's order.

I further direct that the Intended Respondents and the Interested Parties file their response to the application within ten (10) days of the date of service, and further direct that the matter be mentioned on 11.10.2005 for further directions.

Dated and Delivered at Nairobi this 22nd day of September, 2005

ANYARA EMUKULE

JUDGE