



REPUBLIC OF KENYA



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Kahuhia v Githua (Suing on Her Own Behalf and on Behalf of the Estate of George Githinji Gitau - Deceased) (Civil Appeal E711 of 2023) [2025] KEHC 5768 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5768 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E711 OF 2023**

REA OUGO, J

APRIL 24, 2025

BETWEEN

JEREMIAH KAHUHIA APPELLANT

AND

BEATRICE MUTHONI GITHUA (SUING ON HER OWN BEHALF AND ON BEHALF OF THE ESTATE OF GEORGE GITHINJI GITAU - DECEASED) RESPONDENT

(Judgment (An Appeal from the ruling and order of Principal Magistrate (Hon. D. M. Kivuti) dated 23.9.2021 in Chief Magistrate Civil case No. 5888 of 2007)

JUDGMENT

1. The background of this appeal is as follows; the respondent sued the appellant in the lower court in Civil Case No. 5888 of 2007. Judgment was delivered for the Respondent for the sum of Kshs.1,679,779.80/= together with costs and interest at court rates on 27.4.2021. After delivery of the judgment, the appellant filed an application dated 2nd June 2021 seeking a stay of execution pending the lifting of a moratorium against United Insurance Company Limited his insurer. In a ruling dated 3.9.2021, the applicant's application was dismissed. Thereafter the appellant filed this appeal
2. The appeal is on the following grounds;
 - i. That, the learned Magistrate erred both in fact and in law that he had not been directed to the existence of a moratorium in spite of a copy of the moratorium being attached in the application for stay of execution and the same being mentioned in their submissions.
 - ii. That the learned Magistrate erred in both law and fact by ruling that he had not been directed to the existence of a moratorium failing to appreciate the fact that a company under statutory management cannot exist without a moratorium.



- iii. That the learned Magistrate erred in law in ruling that the application for stay of execution was made in the wrong court.
3. The appellant seeks that the appeal herein be allowed, the lower court ruling be set aside, and the application for a stay of execution pending the lifting of the moratorium against United Insurance Company be granted. That costs of the appeal be granted to the appellant.
4. Parties canvassed the appeal by way of written submissions. The appellant submits as follows: At the time of the accident, his vehicle was insured by United Insurance Company Limited, which is now under statutory management. Under the principle of indemnity, it was the responsibility of the insurance company under third-party insurance to settle any claims arising from the injury to a third party. The changes brought about by the Insurance (Amendment) Act 2019, section 5 (c) 11 protects a policyholder from liability to pay any claim not payable by the insurer due to the moratorium. United Insurance Company has been under statutory management since 2005. It was further submitted in his ruling the learned magistrate stated he had not been directed to the existence of a moratorium staying the proceedings. In their application for stay of execution, they filed a copy of the moratorium. It was also submitted that the learned magistrate failed to appreciate the fact that an insurance company under statutory management cannot exist without a moratorium. Under Order 22 rules 22 and 25 of the Civil Procedure Rules the court issuing the judgment has the power to order a stay of execution, the court has the discretion to issue a stay of execution pending the filing of the appeal. That the appellant approached the right court in their stay of execution application.
5. The respondent opposed the appeal. The respondent set out the prayers sought in the appellant's application and the grounds upon which they opposed it. On the 3 grounds of appeal, the respondent submitted as follows: the court rightly found that there was no evidence that the alleged moratorium was in existence or was in force at the time of the application. The court's holding was on the basis that since the existence of the alleged moratorium was the subject of hearing and determination of the preliminary objection in Misc. No. 22 of 2006, the status of the said cause was necessary in proving the moratorium was indeed in existence. The court observed that the moratorium exhibited by the applicant did not expressly or implied the stay of the subject of the proceedings and had no effect. There was, therefore no basis for granting the stay. The appellant's submission that he is protected by the moratorium issued against United Insurance Company Ltd has no basis in law. Section 67 (c) (11) of the *Insurance Act* does not shield the appellant. It was submitted that when a moratorium is declared by a manager as provided under section 67 (c) (10) of the *Insurance Act* can only affect the right of the insurer's policyholder and creditors but not a third party claiming against the policyholder. A third party is not within the purview of a creditor or policyholder. Section 67 (c) (11) does not in any way affect the right of the respondent as at no given point was the respondent a policyholder or creditor. Further, the appellant did not have any judgment against the Insurance Company, which required the insurer to settle. The court has not been furnished with any information that the insurance was liable to pay the decretal sum owed to the respondent. Reliance was made in the following cases: *Blueshield Insurance Company Ltd (2020) eKLR* and *Kitui HCCA No. E011 of 2023 Peterson K. Kiarie vs Japheth Kyalo Kiema*. It was further submitted that the appellant, despite maintaining that he was a policyholder, failed to produce the policy of insurance to prove his claim. On the stay, it was submitted that the court had the right to reject the same on the basis that the same was being sought in the wrong court. The application should have been filed in the court that handled the moratorium issue as the lower court had no power to extend or terminate the moratorium.



Analysis And Determination.

6. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence on record and make its own conclusions (see *Selle vs Associated Motor Boat Co.* [1968]). The impugned Ruling states;

“The application dated 10th June 2021 seeks to stay the decree pending the lifting of moratorium against United Insurance Company Limited.

The application has been opposed.

The application is misconceived to the following reasons.

I have not been directed to the existence of a moratorium staying the proceedings.

That in any event the application ought to be filed in the right court.

Consequently the application lacks merit, the same is dismissed”.

7. The grounds of appeal raise two issues as follows; whether the learned magistrate erred by ruling that he had not been directed to the existence of a moratorium and that the learned magistrate erred in law in ruling that the application for stay of execution was made in the wrong court.
8. On the first issue the appellant argues that in his application for stay of execution, they filed a copy of the moratorium, the learned magistrate failed to appreciate that an insurance company under statutory management cannot exist without a moratorium and that he is protected by section 5 (c) 11 of the Amended *Insurance Act* 2019, which states as follows, “For the purpose of this section, where a moratorium is declared under subsection (10), a policyholder shall not be liable to pay any claim not payable by the insurer due to the moratorium”. The respondent argued that there is no valid moratorium in favour of United Insurance Company Ltd in existence at the time of the application. It was further submitted that the moratorium exhibited did not expressly or imply the stay of the subject proceedings and therefore the same had no effect. The appellant blocked out the status of Misc. No. 22 of 2006. The respondent further submitted that section 67 (c) (10) of the *Insurance Act* does not apply to the appellant as when a moratorium is declared by the manager against the insurer, it can only affect the right of the insurer’s policyholders and creditors but not a third party claiming against the policyholder and that a third party is not within the purview of a creditor or policyholder. The appellant has not shown that he has a declaratory judgment against the insurance company. The respondent relied on the case of BlueShield Insurance Company Ltd (2020) eKLR for his argument on section 67 (c) (11) of the *Insurance Act*. Further, it was submitted that the appellant failed to produce the policy of insurance to prove his claim.
9. The appellant sought a stay of execution of the judgment delivered on the 27th of April 2021 and all consequential orders pending the lifting of the Moratorium against United Insurance Company. To support his application he filed a copy of the insurance certificate and a Declaration of Extension of Moratorium which states as follows:

“Pursuant to the application by the Commissioner of Insurance in existence of its powers under section 67 C (3) of the *Insurance Act* and to the Orders of the Court subsequently issued on the 28th May 2019, the period of Statutory Management has been extended up to the hearing and determination of the preliminary objection on cause No. 22/2006.

Now Take Further Notice that in exercise of powers conferred by section 67 C (10) of the *Insurance Act*, the Statutory Manager hereby extends the Moratorium on payments to the



said insurer to its Policyholder and all other creditors up to the hearing and determination of the preliminary objection to cause No. 22/2006.

10. The appellant was to show the trial court that the moratorium that was in force applied to him too. There was no evidence tendered by him that he was part of the cause No. 22/ 2006 or that he had a policy with the Insurance Company. In the cases cited by the respondent, the applicants demonstrated that they were policyholders. The Certificate of Insurance and the Declaration of Extension of the Moratorium which cited the proceedings in cause no. 22 of 2006 was not evidence that there was a moratorium in his favour. The appellant should have tendered evidence before the trial court that there existed a moratorium staying the proceedings in CMCC No. 5888 of 2007. The learned magistrate did not err when he stated that he had not been directed to the existence of a moratorium staying the proceedings.
11. On whether the appellant filed his application in the right court. The Declaration of Extension of the Moratorium he filed referred to Cause No. 22/2006. The appellant did not inform the court that he was a party in the said cause. In my view, the appellant ought to have filed his application for stay of execution in Cause no. 22/2006 and not before the lower court. The appeal lacks merit and is dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF APRIL 2025.

R.E.OUGO

JUDGE

