



Kamakya alias Martin Kamakya Mutisya v Resolution Insurance Company Limited; Ngumbi (Interested Party) (Civil Case E005 of 2020) [2024] KEHC 891 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEHC 891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE E005 OF 2020
FR OLEL, J
FEBRUARY 7, 2024**

BETWEEN

MARTIN KAMAKYA ALIAS MARTIN KAMAKYA MUTISYA PLAINTIFF

AND

RESOLUTION INSURANCE COMPANY LIMITED DEFENDANT

AND

PETER NGUMBI ALIAS PETER NGUMBI MWALYO INTERESTED PARTY

RULING

A. Introduction

1. Vide a Notice of Motion Application dated 3.03.2023 brought under Order 9 Rule 9, Order 40 Rule 7, Order 51 Rule 1 & 3 of the [Civil Procedure Rules](#) and Sections 1A, 3A of the [Civil Procedure Act](#) the Applicant seeks the following orders that;
 - a. The suit herein filed against the Defendant be stayed during the pendency of the moratorium declared by the statutory manager on 5th April 2022.
 - b. There be no order as to costs.
2. The application is supported by the affidavit of William Masita, who stated that he was retained by the policy holder compensation fund as the managing trustee and was therefore competent to swear the affidavit made in support of the application. The Applicant Company was currently under statutory management having been placed so on 05.04.2022 by the Commissioner of Insurance for a period of 12 months as stipulated under section 67 of the [Insurance Act](#).
3. He averred that the statutory manager had declared a moratorium on payment of policy holders and other creditors and thereafter obtained among other orders, an order staying all manner of proceedings



in whatever nature or form against the Applicant Company during the pendency of the moratorium issued in Nairobi High Court Miscellaneous Application No 168 of 2022. That in light of the said order the plaintiff herein was barred from initiating proceedings as against the defendant/applicant as that would go against the express orders issued by the superior courts.

4. It was deposed that the policy holders, creditors or potential creditors rights would not be jeopardized or prejudiced as under section 67(10),(b) of the *insurance Act*, time stops to run for purposes of *limitation of Actions Act* and the effect of the court order/moratorium was limited to preserving the rights of future/prospective litigants with bona fide cause of action against Resolution insurance co ltd(under statutory management) and therefore the plaintiff would still have an opportunity to prosecute his case in the future.
5. That without the stay orders as sought herein, the Defendant company would be exposed to endless litigation and defeat the purpose for which the statutory manager had been appointed. It would further cause the company to expend monies in defending litigation and execution proceedings, which ultimately will cause the liabilities of the company to increase and prejudice its revival. The application was therefore merited and should be granted as prayed for.
6. The Plaintiff/Respondent did not file any response to the said Application and their counsel did intimate to court that there were not opposed to the orders sought being granted.
7. The interested party on the other hand filed a Replying affidavit dated 25.04.2023 in which he stated that following a road traffic accident, which occurred on 05.03.2019, he sued the Plaintiff/ Respondent and served the Applicant with a notice of intention to sue. He subsequently filed his Plaint on 15.08.2019 and despite effecting service of summons, the Applicant and/or the respondent did not enter appearance nor did they file their statement of Defence. Subsequently an application for interlocutory judgment was filed on 18.10.2019 and the same eventually endorsed by the trial court and Judgement was eventually entered in his favour after formal proof.
8. The interested party did contend that grant of the order sought herein would prejudice him and it would not be in the interest of justice to issue the same. The Defendant/applicant had a contractual duty/obligation to pay out claims under the policy and the fact that it was placed under statutory management did not release them from the said contractual obligation. This application was made in bad faith and with the sole intention of delaying the proceeding herein. The interested party thus prayed that this application be dismissed with costs.
9. The Defendant/Applicant filed a supplementary Affidavit dated 29.06.2023, where they reiterated the contents of the earlier affidavit filed. Further they stated that the term of the Statutory manager was extended by six (6) months commencing 5th April 2023 and annexed a copy of the court orders issued on 26th April 2023 in High court Nairobi Miscellaneous Application No E57 OF 2023, which extended the term of the policy holders compensation fund as statutory manager for a further period of six (6) months.
10. The Application was canvassed by way of written submissions. The Defendant/Applicant did file his written submissions on 29.06.2023, while the Interested Party's submissions were filed on 24.07. 2023.

B. Parties Submissions

Defendant/Applicant Submissions.

11. The Defendant/Applicant submitted that the defendant company was placed under statutory management on 5th April 2022 by the commissioner of insurance as mandated under Section 67 (c), (2), (c) of the *Insurance Act*, Cap 487 for a period of twelve (12) months effective 5th April 2022



- and proceeded to appoint the policy holder's compensation Fund as the statutory manager. The said statutory manager did declare a moratorium to enable him discharge his duties effectively and submitted his first report to the commissioner of Insurance on 27th March 2023.
12. Upon receipt of the said report, the commissioner of Insurance filed Nairobi High court Miscellaneous E257 of 2023 seeking extension of the term of the statutory manager and vide a ruling dated 20th April 2023, the term of the statutory manager was extended for six (6) months effective 4th April 2023, and subsequently the statutory manager did extend the moratorium period for a further six months effective 4th April 2023.
 13. It was the Defendant/Applicant contention that, Section 67 (c), (2) (i) of the *Insurance Act* allowed for the appointment of the statutory manager and under Section 67(c), (7), (8) and (10) of the *Insurance Act*, the statutory manager could issue his statutory report, and declare a moratorium on payment by the insurer of its policy holders and other classes creditors. Reliance was placed on *George Ngure Kariuki Vs Charles Osoro Makome & Another* (2014) eKLR, *Hoggers limited (In Administration) Vs John lee Halamandres & 11 others* (2021) eKLR, In *Midland Energy Limited Vs George Muiruri T/A Leakeys Auctioneers & Another* (2019) eKLR, & In *Re; Nakumat Holdings Limited* (2017).
 14. The applicant further submitted that the effect of a moratorium was that it was similar and had the effect of administration under section 560(1) of the *Insolvency Act*. During pendency of a moratorium, the company was unable to and by law was barred from defraying debts, including accrued legal fees and settlement of legal fees. This was the confirmed legal position as pronounced in *Desbro (Kenya) limited Vs General Printers Limited; NCBA Bank Kenya Limited & Another (Objector's)*, (2021) eKLR & *Odera obar & co Advocates Vs Charter House Bank limited* (2018) eKLR.
 15. It was therefore in the interest of Justice to stay these proceedings as sought for by the instant application, as any order to the contrary would expose the applicant to suffer irreparable loss and damage as litigation would continue unabated without legal counsel, and as a consequence there would be several undefended suits and decree's emanating from different suits filed all over the country.
 16. The applicant therefore prayed that their application be allowed, to enable the statutory manager preserve the company assets pending determination as to whether the company would be revived or wound up by the commissioner of insurance.

Interested Parties Submissi0ns.

17. The interested party did submit that his cause of action stems from a claim of compensation for injuries, loss and expense's sustained as a result of an accident occasioned by the plaintiff who was insured by the Interested Party herein. Despite serving a statutory notice upon the Defendant and summons to enter appearance upon the plaintiff herein, the primary suit was undefended and was heard by way of formal proof. Judgement was entered as against the plaintiff herein and that woke him up from his slumber for he proceeded to file this suit.
18. It was his position that his claim was not time barred under Section 67, (c) 10 of the *Insurance Act* nor was he a policy holder or creditor of the Defendant company and therefore should be allowed to enforce his judgement. The doctrine of privity of contract hypothesized that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party, not bound by the said contract. Reliance was placed on *HCC No 88 of 2012 In the matter of concord Insurance company limited* (2014) eKLR & *In the matter of Blue shield limited (under statutory management) civil suit No 465 of 2011 (o.s)*.



19. The second issue the interested party addressed was whether the applicant should be granted orders of stay of proceedings herein. Such orders were discretionary and could only be granted in grave and deserving matters. Further the court had to consider each case independently as such an order could interfere with a litigant's right to access justice. Reliance was placed on [Kenya wildlife service's Vs James Mutembei \(2019\) eKLR & Re; Global Tours & Travel Ltd HCWC No 43 of 2000.](#)
20. The interested party deposed that, both the plaintiff and defendant were served with pleadings in the primary suit and ignored to participate in the said proceedings. He had a legitimate expectation under Article 159(2), (a), (b), (c) and (d) of [the constitution](#) of Kenya 2010 as read together with Section 1A and 1B of the [Civil procedure Rules](#) to have his suit expeditiously disposed of, and at affordable cost. The act of filing a declaratory suit after ignoring the primary suit showed bad faith on the part of the plaintiff/Respondent and his insurer. They had not met the "exceptional circumstances rule" the basis upon which the orders sought could to be granted.
21. The Interested party thus prayed that the Defendant/Applicant application be dismissed with costs.

C. Determination

22. I have considered the Notice of Motion Application, the Affidavits on record and the submissions on record and find that the issue for determination is whether this suit should be stayed during the pendency of the moratorium declared by the statutory manager on 5th April 2022 and extended for a period of Six months commencing 4th April 2023, and whether the moratorium applied to the interested party herein.
23. The court has seen the letter from the Insurance Regulatory Authority dated 5th April 2022 addressed to the managing trustee of Policyholders compensation fund whose subject is "Appointment As Statutory Manager-resolution Insurance Company" and is signed by one Godfrey K. Kiptum, the Commissioner of Insurance & Chief Executive Officer. The letter reads in part;

.....

Your appointment is for a term of twelve (12) months with effect from 5th April ,2022. During the period, you shall be required to prepare and submit to the Authority a report on the financial position and the management of the insurer with the appropriate recommendations as to whether the company may be reviewed or liquidated.
24. The Applicant has also annexed the declaration of the moratorium by the managing trustee policyholder's compensation whose contents are similar to the letter dated 5.04.2022 and indicated that the moratorium is for a period of twelve months from the date of the notice. This notice was also published in the newspaper dated Friday, 22.04.2022.
25. The court has also seen the order of the court by Justice D. S Majanja dated 16.06.2022 where the following orders were issued, that;
 - a. An order be and is hereby issued that there be a stay of all proceedings of whatever nature or form subsisting against Resolution Insurance Company (Under Statutory Management) and or her Policyholders during the currency of the moratorium declared by the statutory Manager for a period of 12 months from 5th April, 2022.
 - b. An order be and is hereby issued that there be a stay of all taxation proceedings against Resolution Insurance Company (Under Statutory Management) and or her Policyholders for the period which the said company may become liable for a period of 12 months from 5th April, 2022.



- c. All proceedings of whatever nature or form against Resolution Insurance Company (Under Statutory Management) and or her Policyholders be and are hereby barred for a period of 12 months from 5th April, 2022.
 - d. No statutory notices, demands or claims of whatever nature or form shall be effective against Resolution Insurance Company (Under Statutory Management), its property or her Policyholders for a period of 12 months from 5th April, 2022.
 - e. The running time for purposed of law of limitation in respect of any notice, demand or claim by any policy holder or creditor of Resolution Insurance Company (Under Statutory Management) is suspended and shall remain suspended for a period of 12 months from 5th April, 2022.
 - f. There shall be no orders as to costs.
 - g. These orders shall be published in a newspaper of national circulation within 14 days from the date hereof.
 - h. Any party affected shall be at liberty to apply for any further and other orders.
26. In effect, the moratorium lapsed on 5th April 2023 however the Applicant through its Supplementary Affidavit presented the court with an order dated 26.04.2023 issued by Justice N. Sifuna in which the following orders were issued, that;
- a. The term of the Statutory Manager of Resolution Insurance Company Limited be and is hereby extended for a further period of six (6) months commencing 5th April, 2023.
 - b. There shall be no orders as to costs.
27. Having taking into consideration the circumstances of the case and the later orders issued by Justice.N. Sifuna issued on 5th April 2023 and there being no other evidence of extension of the duration of the moratorium, the same lapsed on 5th October 2023. Therefore, there is no legal basis upon which this court can stay this suit as the moratorium period has already lapsed.
28. As to whether the moratorium issued under Section 67(c), (10) of the *Insurance Act*, Cap 487 also extends to the interested party, I do find that it does not. This issue was comprehensively dealt with in; In the matter of *Blue shield Insurance Company limited (under statutory management)*, (2017) eklr, where Justice L Njuguna had held that “A Moratorium declared under Section 67(c), (10) of the *Insurance Act* is meant to protect the insurer in this case against its policy holders and its creditors and not the policy holders against proceedings from third parties.”
29. The same position had also bene arrived at by Justice Waweru and Justice Odunga. In declaring the moratorium issued herein ultra vires Justice Waweru held that;
- “It is common ground that the 1st interested party is not a policy holder of blue shield, and except to the extent that she may become a judgement – creditor under section 10(2) of the Insurance (Motor vehicle Third Part Risks) Act, Cap 405 following a decree in a declaratory suit, she is not a creditor of Blue shield. Her suit is against a tortfeasor in negligence. She has no direct connections, as a policy holder or creditor to Blue shield. The moratorium declared by the statutory manager, is so far as it extends to the 1st interested party’s suit, was clearly ultra vires sub section (10) of section 67C of Cap 487.



30. Justice Odunga in the same matter too, also held that;

“A moratorium in my view is meant to protect the insurer against policy holders and creditors. It is not meant to protect policy holders and shield them from meeting their liabilities which they may be obligated to perform for third parties whether in contract, tort or under a statute..... Accordingly, just like my learned brother Justice Waweru, I find that the applicant herein is neither a policy holder nor a creditor of the insurer.”

D. Disposition

31. The Upshot is that the Application dated 3rd March 2023, lacks Merit and the same is dismissed with costs to the Interested Party.

32. The costs are hereby assessed at Kshs.35,000/= payable within the next 30 days. In default execution to issue.

It is so ordered.

RULING WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 7TH DAY OF FEBRUARY, 2024

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 7th day of February, 2024

In the presence of: -

Mr. Kimeu for Plaintiff

Mr. Njage for Defendant

Ms Mutuku for Interested party

Sam - Court Assistant

