



REPUBLIC OF KENYA



**Maitima v Muchui (Civil Appeal E226 of 2023)  
[2024] KEHC 696 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 696 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E226 OF 2023  
EM MURIITHI, J  
FEBRUARY 1, 2024**

**BETWEEN**

**DOUGLAS MAITIMA ..... APPELLANT**

**AND**

**JOHN MUCHUI ..... RESPONDENT**

**RULING**

1. By a Notice of Motion under certificate of urgency dated 19<sup>th</sup> December 2023 brought under Order 51 Rule 1, Order 42 Rule 6 (1) of the [Civil Procedure Rules](#), Sections 1A, 1B, 3 & 3A of the [Civil Procedure Act](#) and all enabling provisions of the law, the appellant seeks stay of execution of the decree/ judgment in Meru CMCC No E140/2021 pending the hearing and determination of the appeal.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of the appellant herein, sworn on even date. Dissatisfied with the judgment of the trial court finding him 100% liable for the accident and ordering him to pay the respondent Kshs 2,000,000 together with the assessed costs of Kshs 146,020, he has lodged an appeal, which has overwhelming chances of success, against it, and he now seeks stay of execution pending the hearing thereof.
3. Unless stay of execution of the decree is granted, he stands to suffer irreparable loss because he is a retired civil servant depended on pension and battling a myriad of ailments. He had taken a 3<sup>rd</sup> party insurance cover with Blue Shield Insurance Company, which company is under statutory management, and there subsists a moratorium and the winding cause is yet to be determined. He is advised by his counsel that under section 5C (11) of the Insurance (Amendment) Act 2019, he is not liable to pay any claim not payable by the insurance during the moratorium.
4. The respondent has opposed the application vide his replying affidavit sworn on 16/1/2024. He avers that the appellant has not met the requirements set out for grant of stay, and as the successful litigant, he



is entitled to enjoy the fruits of his judgment without any unnecessary delay. He avers that the appellant has not demonstrated that he has an arguable appeal with chances of success or that he will suffer any prejudice if the decree of the trial court is implemented. Besides, this is a monetary claim and the appellant can be refunded if he is successful. He prays for the dismissal of the application but he is however amenable to stay being granted on condition that the appellant furnishes security for costs.

## Determination

5. By a letter dated 18/12/2023, attached as “DM2” to the supporting affidavit to the application for stay of execution herein, the Statutory Manager of Blue Shield Insurance Company Limited advised the court of the moratorium and subsequent amendment to the *Insurance Act* to protect the insured as follows:

“ 18<sup>th</sup> December 2023

The High Court Meru

The Chief Magistrate's Court

Meru Law Courts

Po Box 118 064-32694

Meru.

Dear Sir/ Madam,

REF: CC. No 140 of 2021 John Muchui Mbaya -versus Silas Klambi and Two Others

We refer to the above matter and a judgement brought to our attention by one of our clients (Copy attached for ease of reference).

Kindly note that Blue Shield Insurance Company Limited was placed under Statutory Management on 16th September 2011 by the Commissioner of Insurance pursuant to section 67 C of the *Insurance Act* (Cap 487) Laws of Kenya. In line with the foregoing, a Statutory Manager was appointed in accordance with the provisions of Section 67 C (2) (i) of the *Insurance Act* and with effect from the said date the appointments were duly gazetted.

Pursuant to the aforesaid appointment, the Statutory Manager has since declared a moratorium on all payments for a further period pending the hearing 1 and determination of the winding up cause, Milimani He Mise. cause No 238 of 2017 or until otherwise termination by the court. A copy of the said Court Order and the subsisting moratorium are attached for your records. Please note the following:

1. Milimani HC Mise. Cause No 238 of 2017 is yet to be heard and determined. The matter will be mentioned on 15th February,2024.
2. The *Insurance Act* was amended in year 2019 to protect the insured against actions by 3rd Parties by inserting Section 5 C (ii) which reads 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" An extract of the Kenya Gazette Supplement No 103 (National Assembly Bills No 50 is enclosed for your easy reference.)In the circumstance, we kindly request you to set aside the judgement as we await the determination of Milimani HC Mise. Cause No 238 of 20 17. The matter will be mentioned on 15th February, 2024.



Yours faithfully,

For and behalf of Blue Shield Insurance Company Ltd

(Under Statutory Management)

V. H. Magondu

For: Statutory Manager”

Notwithstanding the improper mode of addressing court by correspondence rather than by submissions before it, the court has considered the issue of the protection of the insured from execution of court decrees.

6. The *Insurance (Amendment) Act* No 28 of 2019 amended the provisions of section 67 C of the principal Act to insert subsection 11 which provides as follows:  
“11. 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.”
7. The amendment and moratorium declared by the statutory manager dated 3/11/2017 does not bar civil proceedings against insured persons or policy holders.
8. The applicant’s argument is that High Court Winding-up Cause No 238 of 2017 has not been concluded and the statutory management has not been otherwise terminated by the Court. In the existence of the moratorium, the payment by policyholders, and therefore execution thereof, is put on hold by virtue of the 2019 amendment to the *Insurance Act*.
9. The respondent was content to oppose the application on the basis of the tests arguable appeal, substantial prejudice and provision of security in the grant of stay of execution pending appeal.

#### **Pre-2020 caselaw**

10. The court notes the argument of courts in pre-2020 decisions on the matter when consensus appears to have been that a moratorium by a statutory manager of an insurer did not affect the rights of a plaintiff to recover from an insured. For instance, in *Muthuri Ntara & another v Francis Mworira Igweta* [2016] eKLR of 26<sup>th</sup> day of May 2016, the Court (F.Gikonyo J) ruled as follows:

“I reckon that the Respondent is neither a policy holder nor a creditor of Blueshield Insurance Company. He is merely a decree-holder against the Appellants jointly and severally. Therefore, a moratorium issued to protect the Insurance Company whose fortunes have now dwindled; leading to statutory management does not operate as stay of execution of decrees against the insured. A moratorium is declared by the Statutory Manager under Section 67 c (10) of the *Insurance Act* and it protects the insurer against claims by the policyholders and creditors of the insurer. Accordingly, mere declaration of a moratorium does mean an automatic stay of execution against the insured; the insured must prove before the trial court upon lawful grounds that a stay of execution is merited. Courts have had opportunity to consider the effect of a moratorium on third parties’ suits and decrees. I am particularly concerned that *In The Matter of: Blueshield Limited (Under Statutory*



*Management*) Civil Suit 465 of 2011 (O.S.) Justice H.P.G Waweru said the following about the third party in the suit:

“.....Her suit is against a tortfeasor in negligence. She has no direct connection, as policy holder or creditor, to Blue Shield.

10. The moratorium declared by the Statutory Manager, in so far as it extended to the interested party’s suit, was clearly ultra vires subsection (10) of section 67C of Cap 487.

Justice Waweru also stated in the same case thus:

Similarly, the order of this court of 28th October, 2011, in so far as it affected the 1st interested party’s case .....was made without jurisdiction. The order was made ex parte without the 1st interested party being given an opportunity to be heard on the matter. Now that she has been heard, the order is clearly unlawful and was made in error. It must be set aside in so far as it affects her suit to enable her to pursue the tortfeasor. The obligations of Blue Shield to the 2nd and 3rd interested parties (policy holders) under their contract of insurance cannot concern the 1st interested party.

9. It should be appreciated that the Respondent’s suit and decree is not a declaratory suit or decree against the insurer. It is a decree against the tortfeasor.”

11. The Court is also aware of the decision of 20<sup>th</sup> December 2019 *Stephen Kilonzo Matiliku v Premier Industries Limited* [2019] eKLR (C Kariuki J.) citing F. Gikonyo, J. in HCC No 88 of 2012 *in the matter of Concord Insurance Company Limited* [2014] eKLR, that a claim for payment of the judgment debt from the insured is not covered by the moratorium on the payments by the Insurer to his insured policy holders and creditors, as follows:

“ 47. In this respect, section 67C (10) of the *Insurance Act* provides in part that a declaration of a moratorium by a statutory manager relates to “payment by the insurer of its policyholders and other creditors.”

48. The appellant in this case was neither a policyholder nor creditor of the insurer as he did not fall within neither of the two classes of persons therefore, the moratorium did not apply to him.

49. This position regarding person of the class of the appellant was addressed in HCC No 88 of 2012 in the matter of *Concord Insurance Company Limited* [2014] eKLR where Gikonyo J stated:

“As a good beginning point, I can pronounce with ease that the interested parties herein are not policyholders of or creditors to Concord Insurance Company.... Section 67C (10) of the *Insurance Act* was not intended to deny legitimate suitors of their right to institute proceedings for relief against an insured of an insurance company under receivership for tortious acts of or breaches by the insured. The said section is intended to allow the manager to discharge his duties in relation to the revival of the insurance company. In my own view, I think, the protection offered by the



moratorium and court orders attendant thereto is to the company from payments by the insurer (company) of its policyholders and other creditors, and not necessarily to the policyholders or other creditors against liability from third parties. Therefore, in so far as the interested parties have cases against the insured, there is nothing to stop them from pursuing the claims to logical conclusion.”

50. It is apparent from the foregoing, that the respondent’s claim herein cannot lawfully be subjected to the moratorium which only applies to payments by the insurer, which is under statutory management, to its policyholders and other creditors. That much is also clear from the terms of the Kenya Gazette notice.”

12. The latter decision was made on 20/12/2019 and although both were correct at the time they were made, they cannot be of precedent value today following the amendment to the *Insurance Act* cap. 487 by the *Insurance (Amendment) Act* No 28 of 2019, whose Date of Assent was 13th December, 2019 and Date of Commencement 31st December, 2019.

13. The Court must, of course, observe the presumption of constitutional validity of the amendment until any question thereon is determined in a proper suit in that behalf. It is the interpretation of the law that will determine the decision of the court in this interlocutory application. Subsection 11 provides as follows:

“ 11. 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.”

14. The question remains whether the payment of the decretal sum in the negligence claim herein is “a claim not payable by the insurer due to the moratorium”? Section 67 C on power to declare moratorium is given as follows:

“ 10. For the purposes of discharging his duties, a manager shall have power to declare a moratorium on the payment by the insurer of its policy holders and other creditors....”

15. With respect, the amendment to section 67C inserting subsection 11 does not appear, in my view, to offer the insured the protection against payment of decretal sum in negligence suits as claimed by the statutory manager. The subsection appears, with respect, redundant. It purports to protect the insured from making payments stopped by the moratorium which only affects the payments to themselves the insured (policyholders in the language of the Act) and creditors. The creditors referred to in the subsection are creditors of the Insurer. This not being a declaratory suit, the respondent successful party is not a creditor of the Insurer for whom a moratorium has been declared.

16. This court has not been able to find a binding authority on the issue after the 2019 amendment but it has noted a persuasive decision of *Wycliffe Otieno Onyango v Statutory Manager Blueshield Insurance Co. Ltd & 2 others* [2021] eKLR where the Court (S. N. Riechi J.) held as follows:

“ If there is a moratorium in force as well as subsisting court orders barring the levying of any execution against the policyholders of Blueshield, that should be placed before the trial court.”



17. All in all, the declaration of extension of the moratorium herein dated 3/11/2017 read in part that:

“Now Take Further Notice that in exercise of powers conferred by section 67 C (10) of the *Insurance Act*, the Statutory Manager extends the Moratorium on payments by the said Insurer to its Policyholders and all other creditors with effect from the date of this notice pending hearing and determination of the said winding up cause or otherwise terminated by the court.”

It is clear that nothing in the moratorium bars a third party from executing a decree against a tortfeasor which is the case herein, during the pendency of the moratorium against the insurer. The amendment by subsection 67 C (11) of the *Insurance Act* covers the insured only to the extent of “any claim not payable by the insurer due to the moratorium.” The moratorium in this case is as set out above.

18. The matter, therefore, falls to be considered as a pure stay of execution pending appeal application without the purported fetters of limitation of execution against an insured by virtue of the 2019 amendment to the *Insurance Act*.

19. The law concerning applications for stay of execution of a Judgment and/or Ruling is set out in the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, as follows: -

“ 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

2. No order for stay of execution shall be made under sub rule (1) unless: -

a. The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay.

b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

20. This court respectfully agrees with the Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 that the power to grant stay is discretionary and such discretion should be exercised in such a way as not to prevent an appeal.

21. The decision sought to be appealed against was made on 15/12/2023 while the instant application was filed four days later on 19/12/2023. The application was thus filed timeously without any delay.

22. Whereas the appellant contends that he will suffer irreparable loss if stay is not granted pending the hearing of his appeal, which has overwhelming chances of success, the respondent contends that the appellant will not suffer any prejudice if the decree is implemented because he can always recover his



money, the portion of the decretal sum which may be ordered to be paid, in the event of a successful appeal.

23. The court notes from the grounds of appeal as raised in the appellant’s memorandum of appeal, that the appeal is arguable, which does not mean one that must necessarily succeed, and it is not for the court to go into the merits of the intended appeal.

**Orders**

24. Accordingly, for the reasons set out above, the court allows the appellant’s application dated 19/12/2023 in the following terms:

1. An order for stay of execution of the Judgment and Decree in Meru CMCC No E140/2021 is hereby issued pending the hearing and determination of this appeal.
2. The appellant shall within sixty days (60) days from the date hereof pay the sum of Kshs 500,000 to the respondent.
3. The Record of Appeal to be filed within sixty (60) days from the date hereof.
4. In the event of default of the aforementioned conditions, the stay of execution shall lapse and be of no effect.
5. The costs of the application shall abide the outcome of the Appeal.

Order accordingly.

**DATED AND DELIVERED THIS 1<sup>ST</sup> DAY OF FEBRUARY, 2024.**

**EDWARD M. MURIITHI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

Appearances:

Ms. Aketch for Applicant.

Respondent in person.

