Kiarie v Kiema (Civil Appeal E011 of 2023)
[2024] KEHC 2213 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2213 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CIVIL APPEAL E011 OF 2023

RK LIMO, J

MARCH 6, 2024

BETWEEN

PETERSON KAMAU KIARIE ..... APPELLANT

AND

JAPHETH KYALO KIEMA ..... RESPONDENT

JUDGMENT

1. This appeal has been consolidated with two other appeals to wit Kitui HCCA Nos E011 & E012/23. The 3 appeals relates to the same cause of action which arose from a road traffic accident which occurred on 11th April 2009 along Kyusyani- Kwavonza road involving the respondents who were travelling as fare paying passengers in motor vehicle Registration No. KBF 824H owned by the appellants. The appellant was blamed by the respondents for negligence which they claim caused the accident.

2. Upon trial, the trial court found that the appellant was 100% liable.

3. In this matter, the Respondent, Japheth Kyalo Kiema was awarded Kshs. 81,700/= general damages for the injuries sustained. He was also awarded costs that were assessed at Kshs. 27,525/=.

4. The record indicates that the Respondent proceeded with execution via Notice to show cause when the appellant failed to satisfy the decree passed against him.

5. On 23rd May 2018, the record shows that another Notice to show cause dated 30.5.2022 was issued for 21.6.2022 when the appellant failed to attend court. A warrant of arrest was then issued and following the said warrant of arrest, the appellant moved the trial court vide a Notice of Motion dated 5.10.22 seeking the following prayers;

    i. Spent

ii. That leave be granted to the firm of Paul Mwangi & Company advocates to come on record for the defendant/applicant herein

iii. Spent

iv. That the honorable court be pleased to grant an order of stay of execution of decree and all consequential orders pending the lifting of the moratorium against Blue Shield Insurance Company Limited.

6. It was the appellant's case in the trial court he was a policy holder with Blue Shield Insurance Company and that a moratorium had been declared against the insurance company on 16th September 2011. The appellant's assertion was that he was protected as a policy holder and was not liable to pay any claim by the insurer during the pendency of the moratorium.

7. The respondent opposed application on two main fronts. Firstly, that the firm of Paul Mwangi & Company Advocates was not properly on record and secondly, that there was no evidence exhibited by the appellant that the alleged moratorium against his insurance was still in force. The trial court rendered itself vide its ruling of 17th January 2023 where it found as follows; that the firm of Paul Mwangi & Company Advocates was not properly on record, further, that the appellant had failed to exhibit evidence in proof of the allegation that Blue Shield Insurance Company was his insurer and that it shouldered the obligation to settle the decretal amount. The appellant's application in short was dismissed with costs.

8. The appellant felt aggrieved and filed this appeal raising the following grounds namely;

i. The learned Resident Magistrate erred in law and fact in holding that the firm of Paul Mwangi & Company Advocates were not properly on record on the basis that no leave had been given whereas it was the duty of the court to grant the requisite leave upon application being made.

ii. The learned Resident Magistrate erred in law and fact in failing to appreciate that where leave is sought together with other prayers in the same application, the court has duty bound to dispose of the prayer for leave first before dealing with other prayers in the application.

iii. The learned Resident Magistrate erred in failing to appreciate that leave which was prayed in prayer 2 of the application was impliedly granted or alternatively waved when the court directed parties to file submission on the substantial application.

iv. The learned Resident Magistrate erred in law and fact in failing to appreciate that the prayer for leave was not opposed and should have been granted as ex debito justitiae.

v. The learned Resident Magistrate erred in law and fact in holding that the applicant had not proved existence of contract of insurance while the insurer had confirmed in writing that the applicant was a policy holder.

vi. That the learned Resident Magistrate was wrong in law and fact in holding that the policy holder could only be protected under section 67 (11) (c) only if he had declaratory judgment against the insurer.

vii. The learned Resident Magistrate erred in law and fact in failing to appreciate that the insurer has a statutory duty under the policy to settle every claim by a third party against the insured.

viii. That the learned Resident Magistrate erred in law and fact in holding that Section 67(11) (c) of *Insurance Act* (Third Party Risks) does not protect a policy holder such as applicant herein.

ix. That the learned Resident Magistrate was wrong to consider the Respondent submissions which were filed out of time without leave of the court and were only served upon the applicant after the ruling date had been given.

x. The learned Resident Magistrate erred in denying the applicant leave to file supplementary submissions and giving a ruling date before the applicant advocate was served with Respondent written submission.

9. The appellant in his written submissions faults the trial court for failing to render itself on the prayer for his advocate Paul Mwangi & Co. Advocates to be placed on record. He contends that failure to address the prayer was erroneous on the part of the Magistrate.

10. He further submits that the issue of representation had been overtaken by events on the trial court entertained him severally, including when it directed parties to file respective submissions.

11. In regard to Section 67C (11) of the *Insurance Act* and the trial court finding that it did not protect the appellant, it is submitted that the finding was erroneous. The appellant submits that he is a policy holder protected against claims by third parties despite not having obtained a declaratory judgment against the insurer. The appellant has cited the case of Wycliffe Otieno Onyango vs Statutory Manager Blue Shield Insurance Company Limited & 2 Others (2021) eKLR to support the contention in that case the court found that there was a consensus between the parties that the petitioner in the said matter was shielded from execution by a moratorium declared by the Statutory Manager, BlueShield insurance company Limited and that there was a subsisting Court Order barring the levying of any execution against the policyholders of Blue shield Insurance Company Ltd. The court held that the only thing that was missing was placement of the moratorium and court order before the trial court for its implementation. However, in the present situation the circumstances are different as the existence of moratorium cause after the judgment had been entered.

12. This appeal is opposed. It is submitted that the firm of Paul Mwangi & Co Advocates was not properly on record for the reason that leave to come on record was not sought on the various occasions that the matter came up in court. They have cited the case of Monica Moraa vs Kenindia Assurance Co. Ltd (2012) eKLR where procedural steps on change of advocate after entry of judgment was discussed.

13. On the application of Section 67 C (11) of the *Insurance Act*, counsel for the respondent submits that the appellant would have been shielded from execution if he had obtained a declaratory judgment against its insurer who would have in turn had the obligation to cover his debt against the respondent. It is submitted that in this case, the appellant failed to do so which leaves him liable to settle the decretal amount. Counsel has cited the case of Re Blue Shield Insurance Company Limited (2020) eKLR where the court made the following observations;

> "My understanding of Section 67C (10) of the *Insurance Act* is that declaration of a moratorium can only be made on payment to the policy holders and the creditors as it is meant to protect the insurer against the policy holders and the creditors but not to shield them from meeting their liabilities to third parties. It is also fair and just that the orders made on 28th October 2011 are set aside to enable the proposed interested party pursue his rights".

14. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

15. This appeal has raised two issues namely;

i. Whether the firm of Paul Mwangi& Co. Advocates was properly on record.

ii. Whether the trial court erred in its interpretation of Section 67 C (11) of the *Insurance Act*.

16.

(i) Whether the firm of Paul Mwangi & Co. Advocate was properly on record

Although there is no record from the trial court's proceedings that the appellant attended court on any given day, there is a Notice of Change of Advocates dated 3rd March 2010 which indicate that the firm of Nduati & Company Advocates were coming on record on his behalf. In an application dated 5th October 2022, the appellant sought orders of stay of execution and also sought leave for the firm of Paul Mwangi & Co Advocates to come on record. The trial court's finding was that counsel from the aforementioned firm appeared before the trial court on various occasion but failed to address the issue of representation. On the other hand, the appellant asserts that counsel filed a formal application for leave which was not opposed and that the trial court was duty bound to dispose of the prayer during the hearing. The appellant also holds the view that the issue of representation had been overtaken by events and deemed to have been impliedly granted as the court gave parties direction on filing of submissions on the substantive issues.

17. The Judgment in the trial court was delivered on 28th July 2010 while the application in question was filed by the firm of Paul Mwangi & Co Advocates on 5th October 2022. Order 9 rule 9 of the Civil Procedure Rules, 2010 the rules provides as follows;

> " When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change of intention to act in person shall not be effected without an order of the court-
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be".

18. Order 9 rule 10 provides as follows;

> " An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first".

19. The reasoning behind the provision as observed by trial court is to protect advocates from mischievous clients who will wait until a judgment is delivered and then replace the advocate without paying their legal fees. In elaborating on the provisions of Order 9 rule 9 of the Civil procedure rules, the court, in the case of Kazungu Ngari Yaa Vs Mistry V Naran Mulji & Co. [2014] eKLR stated as follows;

> " The provision envisages two different scenarios and the only commonalities are that there has been a Judgment and previously, there was advocate on record. In first scenario under rule 9(a), the new advocate or the party in person makes a formal application to the court with a notice to all parties who participated in the suit for grant of leave to come on record or act in person.
>
> Under this first scenario, the consent of the previous advocate is not necessary, but what a party must do is give notice to the other parties and then satisfy the Court to grant it leave for another advocate to come on record or to act in person.
>
> In the second scenario under Rule 9(b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the second scenario under Rule 9(b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court".

20. In this instance the trial court opined that the firm of Paul Mwangi & Co advocate appeared before court on various occasions and specifically on 18th October 2022 for hearing, 29th November 2022 and 13th December 2022 for mention but did not move the court to grant leave for them to come on record. However, the trial court failed to note that there was a formal application to that effect. The trial court in my view fell into error by not addressing itself on prayer (ii) of the application dated 5.10.2022. It only directed its mind to the substantive prayer No. (iii) when the provisions of order 9 Rule 10 anticipates that the prayer for leave can be canvassed together with the substantive prayer. No one would be prejudiced in that event. The trial court therefore fell into error when it failed to make an express finding on prayer (ii) and instead went ahead to find that Paul Mwangi & Co. advocate were not properly on record. This court finds that after moving the trial court for leave to come on record, they should have been granted leave unless service had not been effected.

21.

(ii) Whether the trial Court misinterpreted the provisions of Section 67 (c) (ii) of the *Insurance Act*

It is evident from the record that the appellant got an order via Nairobi Misc Appl. No. 547 of 2012 where the court made the following order;

> " The term of the statutory manager of Blue Shield Insurance Company Limited be and is hereby extended pending the hearing and determination of all that winding up cause, being Milimani High Curt Miscellaneous Cause No. 238 of 2017 or until otherwise termination by this court".

22. It was the appellant's case that his motor vehicle was insured by Blue Shield Insurance Company Limited which had been placed under statutory management and moratorium on 16th September 2011. Notably, the appellant only annexed a court order dated 3rd November 2017 which extended the statutory manager's term as at 2017, more than seven years after the trial court's judgment in this matter. There was no evidence tabled to show that there was a moratorium which had been issued in

2011 as alleged. In the Declaration of extension of moratorium itself, the statutory manager indicates as follows;

> "Now take further notice that in exercise of powers conferred by section 67C (10) of the *Insurance Act*, the statutory manager extends the moratorium on payments by the said insurer to its policy holders and all other creditors with effect from the date of this notice pending the hearing and determination of the said winding up cause or otherwise terminated by the court".

23. As highlighted by the trial court, there was no evidence tendered indicating that the appellant was indeed a policy holder with an existing policy at the time with Blue Shield Insurance Company Limited. Additionally, the trial court held that appellant had failed to file a declaratory suit against its insurer requiring it to settle the amount. The trial court also held that the moratorium only affected insurer's policy holders and creditor but did not affect third parties claiming against policy holders. The appellant however maintains the position that he was not required to take-out third-party proceedings against its insurer for him to benefit from relief obtained from the moratorium.

That position taken by the appellant is erroneous and the trial court was correct in its finding in that regard.

24. This is because the law is clear on this. Section 67C (10) and (11) provides as follows;

> " 10. For the purposes of discharging his responsibilities, a manager shall have power to declare a moratorium on the payment by the insurer of its policy-holders and other creditors and the declaration of a moratorium shall;
>
> a. be applied equally to all classes of policy-holders and creditors, subject to such exemptions in respect of any class of insurance as the manager may, by notice in the Gazette specify
>
> b. suspend the running of time for the purposes of any law of limitation in respect of any claim by any policy-holder or creditor of the insurer
>
> c. cease to apply upon the termination of the manager's appointment whereupon the rights and obligations of the insurer, its policy-holders and creditors shall, save to the extent provided in paragraph (b), be the same as if there had been no declaration under the provisions of this subsection
>
> Provided that this subsection does not apply to any sum due as contributions or penalties to the Policyholders' Compensation Fund
>
> 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".

25. A "policy-holder" is defined in the act to mean; the person who for the time being is the legal holder of the policy for securing the contract with the insurer.

26. The trial court correctly found that a moratorium under section 67 (c) (10) of the *Insurance Act* is meant to protect the insurer against its policy holders and creditors and not policy holders against proceedings from Third parties.

27. The proceedings at the trial were between the appellant and the Respondent. Judgment was entered against the appellant who was well aware of the proceeding's contrary to his assertions. There is a return of service on record and memorandum of appearance filed by Malonza & Co. Advocates on 5th October 2009. The appellant therefore knew about the case and should have informed its insurer.

28. Section 10(2) of the Insurance (Motor vehicle third party Risks) Act provides as follows;

> " No sum shall be payable by an insurer under the following provisions of this section,
>
> a. In respect of any judgment unless before or within 30 days after the commencement of the proceedings in which the judgment was given the insurer had notice of the bringing of the proceedings...."

29. The Court in the Case of In the Matter of Concord Insurance Company [2014] eKLR held as follows;

> " As a good beginning point, I can pronounce with ease that the interested parties herein are not policy-holders of or creditors to Concord Insurance Company. They do not even come closer to being judgment-holder because their cases are yet to be concluded. Even those cases are not against Concord Insurance Company. The only possibility of Concord being drawn into those cases is if judgment is entered against the insured and a declaratory suit is accordingly obtained against Concord. 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 policy-holders and other creditors, and not necessarily to the policy-holders 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".

30. In Re Blue Shield Insurance Company Ltd [2020] eKLR, it was also held as follows;

> " My understanding of Section 67C (10) of the *Insurance Act* is that declaration of a moratorium can only be made on payment to the policy holders and the creditors as it is meant to protect the insurer against the policy holders and the creditors but not to shield them from meeting their liabilities to third parties. It is also fair and just that the orders made on 28th October 2011 are set aside to enable the proposed interested party pursue his rights".

31. In the matter of Blue Shield Insurance Company Limited (Under Statutory Management) [2017] eKLR, the court referenced other decisions as follows;

This issue was dealt in two other similar applications against the respondent herein by Justices 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 judgment-creditor under section 10(2)

of the Insurance (Motor Vehicle Third Party 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 connection, as 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 subsection (10) of section 67C of Cap 487."

Justice Odunga found the orders made on 28th October, 2011 in so far as it affected the 1st Interested Party to have been made without jurisdiction and the same to be unlawful. He further 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 obliged 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."

32. This court finds that the appellant did not file a defence denying liability and the judgment from the trial court against him has not been set aside. The appellant insists that he is a policy holder with Blue Shield Insurance Company Ltd and if that is the case he was under an obligation rope in his insurance Company at the trial to cover him incase he was found liable to satisfy the judgment. Failing to do so left him to carry the burden on his own and can only have himself to blame.

In the premises save as the finding on legal representation of the appellant, I find no merit in this appeal and is disallowed with costs. This judgment shall apply to Civil Appeal No. E011/23 & E012/23 which are similar in this appeal.

DATED, SIGNED AND DELIVERED AT KITUI THIS 6TH DAY OF MARCH, 2024

HON. JUSTICE R. K. LIMO

JUDGE